Supreme Court, U.S.
FILED

No. _____

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In The
Supreme Court of the United States

THE CITY OF WACO, TEXAS,

Cross-Petitioner,

v.

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B. AMMANN; JAMES A. BAKER; ET AL.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is a violation of the U.S. Constitution for Congress to impose the requirements of the Fair Labor Standards Act on municipalities?

2. Whether Cross-Petitioner established a 28-day work period when it declared, by written memorandum, the adoption of a 28-day work period but paid its employees on a 14-day work period basis?

3. Whether the Texas Constitution requires Cross-Respondents to refund all overpayments of wages made by Cross-Petitioner?

4. Whether Cross-Petitioner's overpayment of wages should be credited against each Cross-Respondent's damages before assessing liquidated damages as opposed to after?

5. Whether the calculation and assessment of damages and attorneys' fees should be determined as if the proceeding were a "collective action," rather than a class action under Rule 23 of the Federal Rules of Civil Procedure?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Conditional Cross-Petition, the parties are:

Cross-Petitioner: The City of Waco, Texas, is a municipal corporation organized and existing under the laws of the State of Texas.

Cross-Respondents: Joseph Singer, Charles Lindorfer, Rosalio Amaro, Carl B. Ammann, Tim Anderson, James A. Baker, Michael L. Ball, Chris Ballew, James Banister, Rob Barlow, Ulysees C. Barnes, Sr., Dewey F. Barnett, William Gerald Bass, Robert M. Beechner, Loy T. Beene, Jr., Robin Bergerson, Louis E. Bittle, Shane C. Bivens, Allan H. Blahuta, Lowry W. Bonner, Freddie Bottoms, Williams T. Brandon, Lawrence L. Bright, William C. Buchanan, Thomas E. Buchta, Matthew Carey, Shon Cavett, Clinton L. Coates, Jr., Thomas L. Cockrell, Mary Coleman, Independent Executrix of the Estate of James A. Coleman, III, Jerry E. Collier, Kelley Brent Compton, Ronnie Conder, William L. Conner, Joe P. Cook, James C. Cooper, Robert Covey, Toby Craig, William J. Crow, Jay Cunningham, Scott Cupit, Gary L. Davis, John M. Daws, Keller Allen Dennis, Hershel G. Doss, Albert D. Drakes, Sr., Wade Durbin, Billy L. Eary, Roger S. Fedro, Jerry Fikes, Scott Garner, Jerry W. Gautier, Tom R. Gent, J.P. Germany, Neal Gibson, Sidney B. Gilliam, David Golden, Dalton Gooden, Michael R. Graham, Gerald Groppe, Greg Groppe, Kevin Groppe, J.T. Guthrie, Billy J. Hammond, David C. Harris, Tracy C. Hawthorne, Raymond Helona, Derek Henry, Larry James Hoelscher, Dave K. Holmes, Ramonell James, Raymond L. Jaska, Jessie Johnson, surviving spouse of Cardell D. Johnson, Sr., Jon M. Johnson, Michael L. Johnson, Clinton E. Johnston, James W. Jordon,

PARTIES TO THE PROCEEDING – Continued

Duane Kalina, Wade R. Kaminski, Jason Keiningham, Nelson W. Kelinske, Patrick M. Kerwin, Gregory L. Kistler, Stanley G. Knight, Edward R. Kocian, Joe Kreder, Dalforde Langston, Gary Lee, Keith D. Lee, Michael Lenart, John W. Linda, Clarence L. Ling, Gregory A. Lippe, George W. Litton, Marcos Lozano, Scott Luepke, Gernice T. Lykins, Dusty Lynch, Rich Lynch, Darrel Lyons, James W. McKee, J.D. McPherson, Daniel L. McSpadden, Danny Machac, Larry Joseph Maddox, Braden A. Martin, James Mary, Shawn Mason, Terry E. Mayer, Jimmie Mauppin, Dean Mendez, Darren Meyer, David Michalewicz, Joseph B. Molina, James C. Monroe, William C. Monroe, Charles W. Montroy, Michael Paul Nichols, Jesse Niemeyer, Larry B. Nolen, Randy Nors, Jeremey James Nunes, Gary Owen, Frank L. Packwood, Bobby Pankonien, Jerry Dale Pankonien, Ralph B. Patrick, George W. Paulk III, Chris Pechacek, Donald Penoli, Adam Perry, Douglas S. Phillips, Melvin Darren Qualls, Berry Raley, Mikeal Ready, Richard T. Reid, Steven C. Reinke, Jimmie D. Robinson, Lester D. Robinson, Benjamin Samarripa, Calvin L. Sanders, David Sauer, Dennis Schroeder, Frank Scott, James A. Seay, Sr., James A. Seay, Jr., Paul E. Simmons, Demetris Smith, Jesse Smith, Christopher Sobin, Henry Wayne Sovey, Michael Shane Spann, Kenneth Stoermer, Bobby R. Teague, Shannon A. Teal, Darrell Townsend, Brian Treat, Brooks Tucker, Steve C. Tull, Richard Tupy, Kenneth Uptmor, Alfonce L. Urbanovsky, Billy Vaden, James R. Varano, II, L.W. Vaughn, Patrick Veselka, John S. Villanueva, Kevin J. Vranich, Raymond Wachsmann, David Walsleben, Ronald W. Walts, Wilburn C. Whorton Jr., Mike Westerfield, James E. Wetterman, Otis Lee Williams, Richard Glen Wilson,

PARTIES TO THE PROCEEDING – Continued

Sherril Don Wood, Charles Yarber, Don C. Yeager, and Royce Zatopek. All petitioners are or were fire fighters employed by Cross-Petitioner.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Cross-Petitioner, the City of Waco, Texas, Defendant in the District Court and Appellee/Cross-Appellant in the Court of Appeals, respectfully submits this Conditional Cross-Petition. Cross-Petitioner requests its Cross-Petition be granted or, at a minimum, held until the Court grants *certiorari* on any of the questions presented in the petition filed by Cross-Respondents Joseph Singer, Charles Lindorfer, and 178 other individually named members of the City of Waco's Fire Department.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-31) is reported at 324 F.3d 813. The judgment and relevant orders of the District Court (App. 32-48) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on March 27, 2003. (App. 1-31). The Court of Appeals denied Cross-Respondents' request for a rehearing *en banc* on April 22, 2003. (App. 80-81). Cross-Respondents' Petition for Writ of Certiorari was docketed on October 21, 2003. Supreme Court Rules 10, 12.5 and 28 U.S.C. §1254(1) provide the basis for jurisdiction over this Conditional Cross-Petition, which is timely filed under Supreme Court Rule 12.5. Cross-Petitioner contended, *inter alia*, that the District Court and the Fifth Circuit Court of Appeals lacked

subject matter jurisdiction because the FLSA cannot be constitutionally applied to municipalities.[1]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Commerce Clause of the United States Constitution, the Tenth Amendment of the United States Constitution, the Fair Labor Standards Act 29 U.S.C. §§201, *et seq.* ("FLSA"), Regulations promulgated pursuant to the FLSA by the United States Department of Labor ("DOL"), and Article III, Section 53 of the Texas Constitution.

The following constitutional, statutory and regulatory provisions are central to this case:

Article I, Section 8, cl. 3 of the United States Constitution

> The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[1] Pursuant to Supreme Court Rule 29.4(b), the Court is advised that 28 U.S.C. §2403(a) may apply, thus the Solicitor General was properly served. Further, to Cross-Petitioner's knowledge, neither the District Court nor the Fifth Circuit Court of Appeals, certified pursuant to 28 U.S.C. §2403(a) to the Solicitor General the fact that the constitutionality of an Act of Congress was drawn into question.

Tenth Amendment to the United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Article III, Section 53 of the Texas Constitution

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

29 U.S.C. §207(h). Credit toward minimum wage or overtime compensation of amounts excluded from regular rate.

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) of this section shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. §207(k). Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for hours of duty which in the aggregate exceed the lesser of

(A) 216 hours, or

(B) The average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §216(b). Damages; right of action; attorney's fees and costs; termination of right of action.

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor

in an action under section 217 of this title in which

(1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or

(2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 C.F.R. §553.201. Statutory provisions: section 7(k).

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in Sec. 553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

29 C.F.R. §553.224. Work period defined.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

STATEMENT OF THE CASE

This is a wage dispute brought as a collective "opt-in" action under Section 216(b) of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§201-219. Cross-Respondents are Joseph Singer, Charles Lindorfer and other similarly situated fire suppression and fire alarm (or dispatch) employees of the City of Waco's Fire Department. Cross-Respondents are non-exempt employees under the FLSA. During the time period at issue, Cross-Petitioner paid Cross-Respondents on an annual salary basis. (App. 3).

By Memorandum to "Fire Department Personnel," former Fire Chief Robert Mercer, Jr., of the Waco Fire Department adopted a 28-day work period coinciding with

the City's 14-day pay period. (App. 11). The memorandum stated, in part:

> A 28-day work cycle will be established that coincides with the bi-weekly pay period. This recurring work period will begin at 7:00 A.M. on Saturday, September 28, 1985 and end at 6:59 A.M., 28 days later. This work cycle will encompass two pay periods. Shift change time will remain the same.

(*Id.*). Fire suppression employees worked 24-hour shifts every third day; that is, they would work 24 hours, then be off of work for 48 hours. (App. 3, 40). Cross-Petitioner paid fire suppression employees on a 14-day pay period basis. Based on the 24-hour shift schedule, fire suppression employees worked 120 hours in one 14-day pay period, 120 hours in the next 14-day pay period, and 96 hours in the third 14-day pay period, with the cycle repeating itself. (*Id.*). Despite the variance in the number of hours Cross-Petitioner scheduled fire suppression employees to work during each pay period, Cross-Petitioner paid them a fixed salary representing 106 hours of straight time, and six hours of scheduled overtime at a rate one and one-half times their regular rate of pay (for a total of 112 hours) each 14-day pay period. (App. 3, 40-41).

To determine the "regular rate of pay" of fire suppression employees for purposes of calculating their overtime rate, Respondent took the employee's annual salary and divided it by 2,912. This represented a three year average number of work hours, including scheduled overtime, a fire suppression employee worked in a given year. (App. 3). Cross-Petitioner's method of paying a fixed sum for 106 hours of straight time and six hours overtime every

14-day pay period resulted in *overpayments* to fire suppression employees in those pay periods in which they worked only 96 hours, and underpayments when they worked 120 hours. (App. 44).

Cross-Respondents asserted that Cross-Petitioner had miscalculated their "regular rate of pay" for purposes of determining overtime pay. Cross-Petitioner maintained it had established a 28-day work period because of Fire Chief Mercer's Memorandum and, therefore, was not required to pay overtime until Cross-Respondents worked over 212 hours in a 28-day work period. Cross-Petitioner counterclaimed and maintained it had overpaid Cross-Respondents and, therefore, was entitled to a total offset of excess wages paid.

The District Court bifurcated the trial, with the issue of liability under the FLSA decided by the jury and the amount of damages determined by the District Court. Despite Fire Chief Mercer's Memorandum establishing a 28-day work period, the jury determined that Cross-Petitioner established a 14-day work period. The District Court ruled that Cross-Petitioner should have actually paid Cross-Respondents in accordance with a 28-day work period in order to establish a 28-day work period.[2] The District Court also credited overpayments made by Cross-Petitioner every third pay period against underpayments made in the other two pay periods, but in situations where

[2] The jury's determination was based upon a jury instruction given to them by the District Court that conveyed to the jury that in order to show it "established" a work period of 28 days, Cross-Petitioner was required to prove that it *actually paid* its fire suppression employees in accordance with the 28-day work period. (App. 7-8).

some of the Cross-Respondents owed Cross-Petitioner more than they recovered, the District Court did not require Cross-Respondents to repay Cross-Petitioner. (App. 44-45). The Fifth Circuit Court of Appeals *affirmed* the District Court's decision. (App. 30, 31).

Cross-Petitioner now appeals to this Court, asserting (i) principles of federalism make it unconstitutional to apply the FLSA to municipalities because of the Tenth Amendment to the U.S. Constitution; (ii) Cross-Petitioner has established a 28-day work period and, therefore, overtime pay is required only after 212 hours are worked in the work period; (iii) the Texas Constitution requires Cross-Respondents to refund *all* overpayments in wages made by Cross-Petitioner;[3] (iv) all overpayments of wages should be credited against each Cross-Respondent's damages *before* assessing liquidated damages, as opposed to after; and (v) given the "opt-in" nature of Cross-Respondents' lawsuit, the calculation and assessment of damages and attorneys' fees should not be determined as if the proceeding were a class action.

SUMMARY OF THE ARGUMENT

Neither the Court of Appeals nor the District Court had subject matter jurisdiction in this case. The Fair Labor Standards Act may not be constitutionally applied to Cross-Petitioner's pay practices because Congress acted

[3] Cross-Petitioner filed a counterclaim in the District Court alleging that the Cross-Respondents were liable under the Texas Constitution for overpayment of wages.

outside its authority when it expanded the scope of the FLSA in 1986 to municipalities like the City of Waco. Article I, Section 8, clause 3 of the United States Constitution grants Congress limited authority to dictate the behaviors of *individuals* acting in matters that *substantially* affect interstate commerce. The City of Waco is not an individual. Rather, Cross-Petitioner is a home-rule municipality created under the authority of the laws of the State of Texas. Cross-Petitioner's methods and means of paying its Fire Department employees are purely matters of local government concern, which have no impact on interstate commerce.

The Fifth Circuit Court of Appeals misinterpreted case law and the Department of Labor ("DOL") regulations when it affirmed the District Court's decision that the Memorandum written by Fire Chief Mercer did not establish a 28-day work period. A written publication by a city to its firefighters/employees adopting a 28-day work period under Section 7(k) of the FLSA is sufficient to establish a work period.[4] Neither the DOL regulations nor the FLSA require that the adoption of a Section 7(k) work period be publicized, or that "magic words" be used. Moreover, there is no requirement that employees must agree to the work period chosen by the employer. 29 C.F.R. §553.201. Since Cross-Petitioner clearly and unequivocally stated ". . . a 28-day work cycle will be established that coincides with the bi-weekly pay period . . . ," it has as a matter of law established a 28-day work period. The fact that Cross-Petitioner chose to pay fire suppression employees on a 14-day work period does *not* affect the establishment of the 28-day work period.

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[4] Section 7k of the FLSA is the same as 29 U.S.C. §207(k).

Cross-Respondents should be required to return all monies wrongly paid to them and belonging to Cross-Petitioner. Specifically, the Texas Constitution prohibits cities from making bonus payments, gifts or other excess payments to its employees. The District Court credited Cross-Petitioner overpayments it made in work periods where Cross-Respondents worked only 96 hours, but were paid for 106 hours straight time and six hours overtime. However, in situations where some of the Cross-Respondents owed Cross-Petitioner more than they recovered in the lawsuit, the District Court should have required Cross-Respondents to repay Cross-Petitioner all the monies they had received in violation of the Texas Constitution.

Class actions under Federal Rules of Civil Procedure Rule 23 cannot be used to assert wage and hour claims brought under the FLSA. Cross-Respondents' only recourse was to bring an "opt-in" or "collective action" under FLSA Section 216(b). The lower courts departed from the individual assessment approach when they assessed fees and costs against Cross-Petitioner as if the matter were a class action under Rule 23 rather than an "opt-in" action under Section 216(b) of the FLSA.

Finally, the lower courts erroneously accounted for credits granted to Cross-Petitioner for overpayment of wages it made to Cross-Respondents in certain pay periods. The Fifth Circuit Court of Appeals affirmed the assessment of liquidated damages and state law damages against Cross-Petitioner *before* crediting overpayments, as opposed to after Cross-Petitioner was credited for *all* overpayments made.

REASONS FOR GRANTING THE WRIT

I. Congress Exceeded Its Constitutional Authority When It Amended The Fair Labor Standards Act ("FLSA") And Regulated How Municipalities Should Pay Their Employees.

The United States Congress "lacks the power directly to compel the States" or to compel municipal government behaviors. *New York v. United* States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *see also, Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Similarly, Congress does not, according to recent Supreme Court holdings, possess the constitutional authority to require municipalities to govern their constituents according to Congress' desires. *New York,* 112 S.Ct. at 2423-24.

In recent years, the United States Supreme Court has undertaken the task of re-examining and determining the constitutional limits of Congress' power to mandate the behaviors of state and local governments.[5] The undisputed result of this protracted re-examination has been a "line-drawing" of sorts by the United States Supreme Court.

This Court has affirmed that the Constitution permits Congress to "coerce" state and local governments into action by tying federal funds to desired behaviors. *New York*, 112 S.Ct. at 2423. Likewise, Congress may, consistent with

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[5] *See, e.g., Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, 643, 145 L.Ed.2d 522 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 114, 134 L.Ed.2d 252 (1996); *Printz v. United States, supra*; New *York v. United States, supra.*

the Supremacy Clause, legislate that federal law shall solely govern a matter and, consequently, that all state and local attempts to regulate the issue are expressly preempted. *Id.*

The Framers of our Constitution did not intend for the federal government to have the power to use the cities as instruments of governance on issues it, *i.e.*, the federal government, considers important. *Printz, supra,* at 920. Consequently, Congress was not granted the authority to regulate municipal governments' behavior, regardless of whether the behavior is directed at local issues, or at issues of federal importance. *Id., see also, Kimel v. Florida Board of Regents, supra* at 643 (Article I of the Constitution does not include the power to legislate that states are subject to suit by private individuals). If Congress does not have the authority to regulate local government behavior, it follows that Congress does not have the authority to dictate to cities how they will pay their employees for tasks performed solely within their local boundaries.

Congress' power under the Commerce Clause is limited to the regulation of individuals, not local governments. When amending the FLSA in 1974 and 1985, Congress purportedly relied upon the authority granted to it by the Commerce Clause, Article I, Section 8, clause 3, of the United States Constitution. Pub. L. 93-259 (1974), *reprinted in* U.S. Code Cong. & Ad. News, 93rd Cong. 2d Sess. 2837-2838 (1974) (legislative history). The Commerce Clause, however, does *not* confer upon Congress the

power to regulate cities as to how they pay their employees.[6]

Cross-Petitioner is not liable to Cross-Respondents under the FLSA, because the 1974 and 1985 Amendments to the FLSA are constitutionally infirm. Subject matter jurisdiction does not exist in this case because neither the 1974 nor the 1985 Amendments to the FLSA may be relied upon to apply the FLSA's provisions to municipalities.

II. Congress Exceeded Its Constitutional Authority Under The Commerce Clause When It Purported To Subject Local Governments Engaged In Purely Local Activities To Suit Under The FLSA.

A. Congress' Authority Under The Commerce Clause Is Limited To Those Matters That Substantially Affect Interstate Commerce.

In general, Congress' authority to enact laws under the Commerce Clause is limited to the authority to regulate interstate commerce, and those activities that substantially affect interstate commerce or have a substantial relation to interstate commerce. *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967). Only that legislation governing economic activity *substantially* affecting interstate commerce will be upheld

[6] This Court has already agreed with Cross-Petitioner's arguments once, in *National League of Cities v. Usery* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), in which this Court invalidated the application of the FLSA to state and local governments.

against a constitutional challenge under the Commerce Clause. *Lopez*, *supra,* at 1627-1629.

What is at issue here is the manner and means by which a city government decides to pay its municipal employees to compensate them for services performed for the local community inside the city limits of Waco. Here, for example, the operation of a local fire department by the City of Waco is, by definition, a purely local matter. The delivery of fire protection services to local residents does not "substantially affect" interstate commerce. The purely local nature of the activities at issue in this case precludes Congress from legislating under the Commerce Clause to control compensation of City employees, including Cross-Respondents.

B. *Garcia* Should Not Control Whether Municipalities May Be Sued Under The FLSA.

In *Garcia v. San Antonio Metro Transit Authority,* the 1974 Amendments to the FLSA were held validly applied to a mass transit authority. *See*, *Garcia v. San Antonio Metro Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Stretching further, *Garcia* overruled its earlier decision in *National League of Cities v. Usery, supra*, in which nine years earlier a 5-4 majority of the Court had concluded that Congress exceeded its Constitutional powers in enacting the 1974 Amendments to the FLSA, which brought local government units under its coverage.

Since *Garcia*, *supra*, the Supreme Court has not again been asked to answer the critical question whether the Commerce Clause authorizes Congress to legislate municipal employees' wages, a matter that is purely local, and

intrastate, in character.[7] Following recent Supreme Court opinions, the answer to this question must now be "no."

Cross-Petitioner urges this Court to re-examine and overrule *Garcia*. The Court's reasoning and holding in *Garcia* do not square with the Court's current recognition of the constitutional limits on Congress' exercise of legislative authority under the Commerce Clause.

C. Recent Court Decisions Indicate A Rebirth Of Federalism.

Since the Supreme Court decided *Garcia* in 1985, it has examined the limitations of Congress' power *vis a vis* the Tenth Amendment on several occasions.[8] First in *Lopez,* and later in *U.S. v. Morrison,* the Court has emphasized that Congressional power to regulate local matters is *not* without limits. *Lopez, supra*, at 1626-1627; *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 1748, 146 L.Ed.2d 658 (2000). Rather, the opposite has occurred with the Court recognizing that the Commerce Clause is "subject to outer limits." *Lopez, supra*, at 1628-1629 (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893 (1937)).

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[7] In *Auer v. Robbins*, the City of Saint Louis conceded FLSA jurisdiction, and the Court did not consider any Constitutional challenges. 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

[8] This Conditional Cross-Petition is grounded on the unconstitutionality of the FLSA as applied to local units of government under the Tenth Amendment, not the Eleventh. The Supreme Court has already undertaken a narrowing of congressional regulation of State activities using Eleventh Amendment sovereign immunity principles. The Court has not applied Eleventh Amendment principles to cities, such as Cross-Petitioner.

In *Lopez*, the Supreme Court drew the line on giving great deference to Congressional action. The Court concluded that expanding Congress' authority under the Commerce Clause would result in there never being ". . . a distinction between what is truly national and what is truly local . . ." *Lopez*, *supra,* at 1633. The Court has recently reaffirmed a long-established principle that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison, supra,* at 1748 (*citing Marbury v. Madison* 1 Cranch, 137, 176, 2 L.Ed. 60 (1803)). In *Morrison,* the Court also reaffirmed that even under a modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. *Morrison, supra,* at 1748, (*citing Lopez, supra,* at 557).

Morrison and Lopez, supra, both identified three categories of activities that Congress *may* regulate under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) those activities having a *substantial* relation to interstate commerce. *Lopez*, *supra*, at 1629-1630. *Morrison, supra,* at 1748-1749. None of these three categories remotely touch the regulation of city employees' overtime pay. First, city employees are not channels of interstate commerce. Neither are they instrumentalities, persons or things in interstate commerce. Finally, city employees do not have substantial (or any) relation to interstate commerce.

As in *Morrison, supra,* neither the City's employees nor its activities have a commercial character. Likewise, neither the purposes of the FLSA (first enunciated in 1938) nor the FLSA's design when applied to municipal employees has an "evident commercial purpose." *Morrison,*

supra, at 1744. The link between city employees' overtime and a substantial effect on interstate commerce is attenuated, just as in *Lopez and Morrison, supra.* Specifically in *Lopez* the Court rejected a "national productivity" argument urged by the proponents of the Brady Amendment. Similarly, here the Court should reject any arguments that the absence of the FLSA's overtime requirements for city employees would have a negative effect on national productivity and/or interstate commerce.

In *New York v. United States, supra,* this Court also whittled away at the effectiveness of *Garcia. New York, Lopez, and Morrison, supra,* have reincarnated the spirit of *National League of Cities v. Usery, supra.* The power to regulate city employees' wages is not specifically mentioned nor implied anywhere in the Constitution. Congress' activities that have only an indirect influence on interstate commerce are not within the realm of Congressional power. *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 550, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). Otherwise, there would be virtually no limit to federal power and this would result in a completely centralized government. *Lopez, supra,* at 1628.

As Justice O'Conner recognized in her dissent to *Garcia,* the majority's decision was a retreat from the dual concerns for federalism and an effective commerce power. *Garcia, supra,* at 1033-1034 (O'CONNER, J, dissenting). The Founding Fathers believed the commerce powers to be limited and would be used primarily to remove interstate tariffs and regulate maritime affairs. *Id.* at 1034. Justice O'Conner also prophesized that the Court would, in time, again assume its constitutional responsibility. *Id.* at 1037. Cross-Petitioner urges that *now* is the time for the Court

to assume its constitutional responsibility and overrule *Garcia*.

III. Cross-Petitioner Established A 28-Day Work Period Under Section 7(k) Of The FLSA.

Cross-Petitioner demonstrated that the City established a 28-day work period under Section 7(k) of the FLSA, by a Memorandum issued to the employees of the City's Fire Department by former Fire Chief Robert W. Mercer. The memorandum stated, in part:

> A 28-day work cycle will be established that coincides with the bi-weekly pay period. This recurring work period will begin at 7:00 A.M. on Saturday, September 28, 1985 and end at 6:59 A.M., 28 days later. This work cycle will encompass two pay periods. Shift change time will remain the same.
>
> (App. 11).

A written publication by a city to its firefighters/employees adopting a 28-day work period under Section 7(k) of the FLSA is sufficient to establish the work period as a matter of law. Pursuant to 29 C.F.R. §553.224, a city may adopt any work period for its fire protection personnel, so long as the work period chosen is (1) "regularly reoccurring; (2) fixed, regardless of how many hours the employees work during the period; and (3) has a set beginning and ending time. *Id.* These conditions have been met and, therefore, Cross-Petitioner has established a 28-day work period. Neither the DOL Regulations nor the FLSA require that the adoption of a Section 7(k) work period be made public, or that "magic words" be used. Moreover, there is no requirement that employees must

agree to the work period chosen by the employer. 29 C.F.R. §553.201.

There is a conflict among the Circuit Courts of Appeal on this question. A number of federal courts have held that a city's formal adoption of a regularly reoccurring 7(k) work period for its employees is sufficient to satisfy the requirements of Section 7(k) and Section 553.224. *Milner v. City of Hazelwood*, 165 F.3d 1222, 1223 (8th Cir. 1999) (district court's summary judgment affirmed when publication of adoption announcement is uncontroverted); *Adair v. City of Kirkland,* 185 F.3d 1055, 1061 (9th Cir. 1999) (affirming statements concerning adoption of Section 7(k) work period in collective bargaining agreement supports the establishment of such a work period); *Bennet v. City of Albuquerque,* 52 F.3d 337, 1995 WL 230315 (10th Cir. 1995). (unpublished opinion) (an inter-office memorandum on 28-day work period is sufficient to prevail on summary judgment); *Lamon v. City of Shawnee,* 972 F.2d 1145, 1154 (10th Cir. 1992) (public declaration of intent to adopt work period is sufficient); *Freeman v. City of Mobile, Alabama,* 146 F.3d 1292, 1297 (11th Cir. 1998) (It is sufficient that the City show it adopted the work period by circumstantial evidence, such as a chief's memorandum explaining the City's work period); *McGrath v. City of Philadelphia*, 864 F. Supp. 466, 476-478 (E.D.Pa. 1994) (recognizing that the establishment of work period may be shown by evidence of a public declaration of intent to adopt such work period); *Kermit C. Sanders Lodge No. 13, Fraternal Order of Police v. City of Smyrna, Georgia,* 862 F. Supp. 351, 356 (N.D. Ga. 1994) (employer prevails on summary judgment with memorandum showing city's intent to adopt such work period).

Under these federal authorities, Cross-Petitioner has clearly established a 28-day work period under Section 7(k). The adoption of a different method of paying employees does not undermine a municipality's clear adoption of a 28-day work period under FLSA Section 7(k). Indeed, Department of Labor Regulations indicate that the adoption of different periods for payroll and Section 7(k)'s work period do not undermine the establishment of the work period for FLSA purposes. 29 C.F.R. §553.224; DOL Opinion Ltr. (Wage and Hour), WH-327, 1975 WL 40950 (June 2, 1975). Evidence that an employer's pay practices vary from the chosen 7(k) work period does not undermine the employer's establishment of the work period, even where the employer's method of calculating payroll results in the payment of *more* overtime or compensation than would otherwise be required, as occurred here. DOL Op. Ltr., WH-327; *Milner, supra,* at 1223.

IV. State Law Required The District Court To Credit Overpayments.

The Texas Constitution mandates that *all* overpayments made by Cross-Petitioner be returned to the taxpayers. Article III, Section 53 of the Texas Constitution provides, in part:

> The legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality

> of the State, under any agreement or contract, made without authority of law.

TEX. CONST. ART. III, §53. Since Cross-Petitioner was prohibited from making bonus payments, gifts or other excess payments to Cross-Respondents, Cross-Respondents must return all overpayments to Cross-Petitioner. Therefore, in situations where some of the Cross-Respondents owed Cross-Petitioner more than they recovered, the Court should require them to repay Cross-Petitioner.

V. Cross-Petitioner's Overpayments Should Have Been Credited *Before* Assessing Liquidated Damages.

The structure and language of Sections 207(h) and 216(b) demonstrate that damages for unpaid compensation and the assessment of liquidated damages are two distinct kinds of relief. 29 U.S.C. §207(h) (overpayments should be credited against unpaid overtime); 29 U.S.C. §216(b) (unpaid overtime or minimum wages are assessed, then liquidated damages are calculated). Because the District Court credited Cross-Petitioner for its overpayments to Cross-Respondents *after* already assessing liquidated damages, the District Court made it difficult to distinguish the two categories of legal relief. Additionally, no statutory or case law supports the District Court's approach. Had the District Court credited Cross-Petitioner for its overpayments *before* assessing liquidated damages, then Cross-Petitioner would have owed Cross-Respondents far less in liquidated damages.

VI. Under The FLSA, Attorneys' Fees Should Be Assessed As A Collection Of Individual Cases, And Not As A Class Action.

Despite the fact that class actions can not be brought under a FLSA claim, the courts below awarded $250,750 in attorneys' fees, which were based upon the damages awarded to Cross-Respondents as a class, not as individuals. Since the attorneys' fees awarded under the FLSA should be assessed based upon the amount of the monetary recovery a plaintiff receives in the matter, the "class-style" approach to the assessment of attorneys' fees resulted in a much larger award than would have been justified, had Cross-Respondents' cases been examined individually on this issue. Here, only 25 percent of Cross-Respondents received any back pay at all, and some of those amounts were miniscule when compared to the amount of attorneys' fees that were awarded by the District Court. (App. 49-78) By way of example, one Cross-Respondent received a back pay award in the amount of $119. (App. 58) The courts below erred by not reducing Cross-Respondents' attorneys' fees request by 75 percent, a percentage equivalent to the number of Cross-Respondents who received nothing in the case.

While the "lodestar" method is the accepted method for calculating attorneys' fees under the FLSA, federal appellate courts generally give substantial weight to the amount of a plaintiff's individual recovery when determining the amount of attorneys' fees that should be assessed against the defendant. One of the distinctions between a commonly brought "class action" under Rule 23 of the Federal Rules of Civil Procedure and the "collective action" authorized under Section 216(b) of the FLSA is that the plaintiffs in a FLSA collective action are permitted to present certain factual and legal issues concerning underpayments of wages as a

group, but are also permitted to have the District Court determine their ultimate damages based upon each plaintiff's individual circumstances. This avoids the requirement contained in Rule 23 of the Federal Rules of Civil Procedure, that the characteristics of the members of the class fulfill the strict similarity requirements of Rule 23(b). *See generally, Theissen v. General Electric Capital Corp.*, 267 F.3d 1095, 1104-1106 (10th Cir. 2001).

When awarding attorneys' fees, the District Court ignored the individual damage amounts provided to each Cross-Respondent in this case. Instead, the District Court treated Cross-Respondents as a Rule 23 class, as opposed to a collective action under Section 216(b) of the FLSA. This resulted in an improper application of the lodestar factors. Specifically, the lodestar factors were applied to the Cross-Respondents as a "class," rather than as a collective action of individual cases. The Fifth Circuit Court of Appeals erred in affirming the District Court's approach, and the award of attorneys' fees should be reversed. Attorneys' fees should be awarded based upon each individual Cross-Respondent's recovery in this case. Where Cross-Petitioner overpaid a Cross-Respondent, no attorneys' fees should be assessed at all.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Court should grant this Conditional Cross-Petition in the event that the Court grants *certiorari* on any of the questions presented in Cross-Respondents' Petition.

Should the Court grant Cross-Respondents' Writ of Certiorari, Cross-Petitioner respectfully requests this

Court grant Cross-Petitioner's Conditional Petition and, after further briefing and oral argument, dismiss Cross-Respondents' federal claims for lack of subject matter jurisdiction on the ground that the FLSA may not be applied to Cross-Petitioner under the United States Constitution. Alternatively, Cross-Petitioner respectfully requests this Court reverse the Fifth Circuit Court of Appeals' affirmation of the District Court's holdings and judgment on the issues involving the 28-day work period, the assessment of liquidated damages, the manner of crediting overpayments, and the assessment of attorneys' fees.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 01-51185

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL,

Plaintiffs-Counter Defendants-Appellants-Cross-Appellees,

versus

CITY OF WACO, TEXAS; ET AL,

Defendants,

CITY OF WACO, TEXAS,

Defendant-Counter Claimant-Appellee-Cross-Appellant

(Filed Mar. 27, 2003)

Case No. 01-51258

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL,

Plaintiffs-Counter Defendants-Appellants-Cross-Appellees,

versus

CITY OF WACO, TEXAS; ET AL,

Defendants,

CITY OF WACO, TEXAS,

Defendant-Counter Claimant-
Appellee-Cross-Appellant

Appeals from the United States District Court
For the Western District of Texas

Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS*, District Judge.

EMILIO M. GARZA, Circuit Judge:

Plaintiffs, former and current employees of the Waco Fire Department ("the fire fighters"), brought suit against the City of Waco ("the City"), claiming that the City's method of calculating their overtime pay violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, as well as state law, *see* TEX. LOC. GOV'T CODE ANN. § 142.0015. The fire fighters prevailed at trial on most of the liability issues, but appeal the district court's calculation of damages. The fire fighters argue (1) that the district court erred in calculating their regular rate of pay; and (2) that the district court erred in offsetting certain overpayments made by the City against the overall damages award. The City admits that its pay practices violated the statute, but has filed a cross-appeal, challenging other issues. The City argues (1) that the FLSA is unconstitutional as applied in this case; (2) that it established a 28-day, and not a 14-day, work period, for its fire fighters; (3)

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* District Judge of the Eastern District of Texas, sitting by designation.

that the district court erred in assessing liquidated damages against the City; (4) that its violation of the FLSA was not willful; and (5) that the district court erred in calculating attorney's fees. Because we find no error in the district court's application of the FLSA and the relevant regulations, we affirm.

I

The fire fighters worked a regularly recurring schedule of 24 hours on-duty followed by 48 hours off-duty. According to this schedule, the fire fighters would work 120 hours in one 14-day period; 120 hours in the next 14-day period; and 96 hours in the third 14-day period, until the cycle repeated itself. The City paid the fire fighters every two weeks. Although the fire fighters worked different numbers of hours in each 14-day pay period, the City paid them the same two-week salary every pay period.

In order to calculate the fire fighters' overtime pay, the City had to determine the fire fighters' regular hourly rate of pay. To calculate the fire fighters' regular rate, the City divided the fire fighters' annual salary by 2,912, which (according to the City) represented the average number of hours that the fire fighters worked during a year. The City used the resulting figure (the fire fighters' hourly rate) to determine the fire fighters' overtime compensation. The fire fighters brought suit, claiming that the City's method

of calculating their overtime compensation violated the FLSA.[1]

On appeal, both the City and the fire fighters challenge various aspects of the district court's decision. We examine each issue in turn.

II

The City asserts that the FLSA is unconstitutional as applied in this case. The City contends that Congress does not have the affirmative power under the Commerce Clause to regulate the way in which a locality pays its fire fighters, because those employees perform solely local functions, and their actions do not substantially affect interstate commerce. The City relies in particular on *Printz v. United States,* 521 U.S. 898 (1997), and *United States v. Lopez,* 514 U.S. 549 (1995), arguing that these cases illustrate the increasing limits on Congress's affirmative authority. The City's argument is interesting, but we believe that it is presently foreclosed by the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), which upheld the constitutionality of the Fair Labor Standards Act as applied to state and local government entities. *Id.* at 555-57. The Supreme Court has made clear that "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case

[1] A number of fire alarm operators were among the 180 plaintiffs who originally filed suit. The claims of these plaintiffs do not appear to be the subject of this appeal.

which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see West v. Anne Arundel County, Md.*, 137 F.3d 752, 760 (4th Cir. 1998) (rejecting a constitutional challenge to the FLSA and citing *Agostini* for the proposition that "[l]ower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent"). Therefore, we proceed to the merits of this appeal.

III

The FLSA generally requires an employer to pay overtime compensation (at a rate of one and one-half times the regular rate of pay) to an employee after the employee has worked over 40 hours in one week. *See* 29 U.S.C. § 207(a)(1). The statute provides a partial exemption, however, for municipalities and other entities that employ fire fighters. *See* 29 U.S.C. § 207(k); 29 C.F.R. § 553.201(a). Under 29 U.S.C. § 207(k), a municipality can take advantage of that exemption by adopting a work period of between 7 and 28 days. If the municipality adopts a 7-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 53 hours in a single week. *See* 29 C.F.R. § 553.201(a); *id.* § 553.230(a). If the municipality adopts a 14-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 106 hours in the two-week period. *See id.* If the municipality adopts a 28-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 212 hours in that four-week period. *See id.* Thus, by adopting a § 207(k) work period, a municipality can

limit the number of hours for which it must pay "time-and-a-half" to its fire fighters.

The City argues that the question of whether it established a 28-day work period is a question of law that the district court improperly submitted to the jury. It is true that the ultimate determination of whether an employer qualifies for an exemption under the FLSA is a question of law. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331 (5th Cir. 2000). That ultimate determination, however, relies on many factual determinations that can be resolved by a jury. *See Smith v. City of Jackson, Miss.*, 954 F.2d 296, 298 (5th Cir. 1992) ("[H]istorical facts regarding the employment history, and inferences based on these facts, are reviewed under the factual standard[.]").

In this case, the "ultimate" legal issue is whether the City qualifies for a § 207(k) exemption, and neither party contests that issue. The parties agree that the City qualifies for some type of exemption, and disagree solely over the extent of that exemption. The City contends that it established a 28-day work period, and did not have to pay overtime compensation until its fire fighters worked over 212 hours in that four-week period. The fire fighters, by contrast, argue that the City established a 14-day work period, and was required to pay overtime compensation after the employees worked over 106 hours in that two-week period. This issue (whether the City established a 14-day or a 28-day work period) is a question of fact, and was properly submitted to the jury. *Spradling v. City of Tulsa, Okla.*, 95 F.3d 1492, 1504-05 (10th Cir. 1996) (observing that the establishment of a particular work period under § 207(k) is "normally a question of fact"); *see also Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1147

(10th Cir. 1992) (noting that the issue of whether the employer established a 28-day work period was decided by the jury).

In this case, the jury determined that the City established a 14-day work period. The City claims that the jury's decision was erroneous because the jury relied on an improper instruction from the district court. The City refers to the following language in the jury instruction:

> The FLSA does not require the selection of a longer work period to be made in writing, or that certain "magic words" be used. A city may show that it has established a longer work period through documents which state that it has established a longer work period. To be established by a city, the longer work period, however, must have been put into effective operation by the city. A longer work period is put into effective operation when a city actually pays its fire fighting employees in accordance with the longer work period. A work period need not coincide with a pay period or duty cycle.

We review challenges to jury instructions for abuse of discretion and will reverse a judgment due to an improper instruction "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations." *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487, 494 (5th Cir. 2002) (internal quotation marks omitted).

The City claims that the district court's instruction misled the jury into thinking that a municipality can only establish a particular work period if it pays its employees in accordance with that work period. As the City observes, a municipality does not have to adopt a pay period that

precisely matches its work period in order to qualify for a § 207(k) exemption. *See* 29 C.F.R. § 553.224 (observing that a work period established under § 207(k) "need not coincide with the duty cycle or pay period"); *Franklin v. City of Kettering, Ohio,* 246 F.3d 531, 535 (6th Cir. 2001) ("By stating that the work period 'need not coincide' with the duty cycle or pay periods, the regulation provides that there need be no relationship between the work period and the duty cycle."); *Adair v. City of Kirkland,* 185 F.3d 1055, 1061 (9th Cir. 1999) ("[T]he City's failure to conform its payroll practices does not negate the existence of the plan.").

However, the district court's instruction did not misstate the law. The district court correctly told the jury that the City *could* establish a particular work period by demonstrating that it "actually pays its fire fighting employees in accordance with the longer work period." *See Freeman v. City of Mobile, Ala.,* 146 F.3d 1292, 1297 (11th Cir. 1998) (holding that the City established a 14-day work period in part by demonstrating that it paid its employees every 14 days). The district court did not tell the jury that the City *was required* to adopt a 28-day pay period in order to establish a 28-day work period. Indeed, the district court explicitly stated the opposite: "A work period need not coincide with a pay period or duty cycle." We find no error in the above jury instruction.

Finally, the City appears to argue that the evidence was insufficient to support the jury's verdict that it established a 14-day work period. First, we must consider whether the City waived this claim by failing to raise it in a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. *See* FED. R. CIV. P. 50(a),(b). That determination could affect the standard of

review that we apply to the City's claim. *See Polanco v. City of Austin, Tex.,* 78 F.3d 968, 973 (5th Cir. 1996). In most cases, "[t]he standard for evaluating the sufficiency of evidence is whether the evidence has such quality that reasonable and fair-minded persons would reach the same conclusion." *Id.* at 974. However, if the City failed to present its sufficiency claim to the district court, the standard is plain error. *See Giles v. General Elec. Co.,* 245 F.3d 474, 482 (5th Cir. 2001).

We have held that "[a] party that fails to move for judgment as a matter of law under Rule 50(a) on the basis of insufficient evidence . . . waives its right to file a . . . post-verdict Rule 50(b) motion, and also waives its right to challenge the sufficiency of the evidence on appeal." *United States ex rel. Wallace v. Flintco Inc.,* 143 F.3d 955, 960 (5th Cir. 1998). We have occasionally made exceptions to this rule. For example, in cases where a party failed to raise the sufficiency claim in a Rule 50(b) post-judgment motion, but presented it in a Rule 50(a) motion at the close of the plaintiff's case, we sometimes hold that the party did not waive the sufficiency claim. *See Polanco,* 78 F.3d at 974-75. In such instances, we apply our usual standard of review.

In the present case, however, it appears that the City failed to raise its sufficiency claim in either a Rule 50(a) or a Rule 50(b) motion. The City, at oral argument, nonetheless contended that it had not waived this claim because it presented the claim in its objection to the district court's jury instruction. It may be that a party can excuse its failure to make a Rule 50(a) motion by presenting the claim in an objection to the district court's jury instructions. *See Wallace,* 143 F.3d at 961-64 (observing, in a case where the party failed to make either a Rule 50(a) or a

Rule 50(b) motion, that the party had also failed to present the issue in an objection to the jury instructions, and thus applying the plain error standard of review). In this case, we need not decide whether the City's objection to the jury instruction was adequately related to its sufficiency of the evidence claim. The City's claim fails under either the usual or the plain error standard of review. *Cf. Daigle v. Liberty Life Ins. Co.,* 70 F.3d 394, 397 n.2 (5th Cir. 1996) ("The record is unclear as to whether or not [the plaintiff] made [the necessary] Rule 50 motions. However, in the present case the result is the same regardless[.]"). Thus, we proceed to address the merits of the City's sufficiency claim.

We have held that the employer bears the burden of proving that it qualifies for an exemption under the FLSA. *Vela v. City of Houston,* 276 F.3d 659, 666 (5th Cir. 2001); *Smith,* 954 F.2d at 298. Therefore, the City had to demonstrate that it was entitled to the exemption in § 207(k). *See Adair,* 185 F.3d at 1060; *Roy v. County of Lexington, S.C.,* 141 F.3d 533, 540 (4th Cir. 1998); *Jones v. City of Columbus,* 120 F.3d 248, 252 (11th Cir. 1997); *Spradling,* 95 F.3d at 1504.

The City claims that it satisfied its burden of proving that it established a 28-day work period. The only evidence provided by the City in support of this contention is a memo circulated in 1985 by then Fire Chief Robert Mercer ("the Mercer memo"), stating that "[a] 28-day work cycle will be established[.]" The fire fighters rebutted this evidence with the deposition and testimony of Janice Andrews, the City's finance director. Andrews stated that the pay period for the City's fire fighters was 14 days, and that she understood the work period to be the same as the pay period. More significantly, Andrews stated that the

City had always calculated overtime compensation on a 14-day basis. The jury could have concluded, based on this and other testimony, that the City established a 14-day work period.

Nevertheless, the City argues that the Mercer memo constitutes conclusive proof that it adopted a 28-day work period. In support of this argument, the City cites numerous cases in which courts have found that the locality met its burden of proving that it had taken advantage of the § 207(k) exemption. However, in each of these cases, the locality either presented more evidence than the City has offered in this case or the plaintiffs failed to present any contrary evidence. *See, e.g., Franklin,* 246 F.3d at 536 (observing that the City established a 28-day work period by demonstrating that it informed its employees about the work period in 1986 and again in 1995, and by producing evidence that the employees knew about the work period); *Milner v. City of Hazelwood,* 165 F.3d 1222, 1223 (8th Cir. 1999) (holding that the City proved a 28-day work period not only by relying on a 1985 memo but also by demonstrating that the employees were scheduled on a "regularly recurring twenty-eight-day basis"); *Adair,* 185 F.3d at 1061 ("The City established a 7(k) exemption when it specified the work period in the [collective bargaining agreement] and when it actually followed this period in practice."); *Freeman,* 146 F.3d at 1297 (concluding that the City established a 14-day work period by relying on a 1974 resolution, a 1993 memorandum, and the fact that its payroll period was also 14 days); *Lamon,* 972 F.2d at 1154 (holding that the City could rely on a 1986 administrative code provision, when the evidence that it established a 28-day work period was "uncontested"). The City failed to produce any evidence other than the Mercer memo to

prove that it established a 28-day work period, and, as we have seen, the fire fighters presented evidence that the work period was 14 days. Thus, we see no reason to disturb the jury's determination that the City established a 14-day work period.

IV

The jury also found that the City's violation of the FLSA was "willful." The issue of whether a particular violation was "willful" determines the statute of limitations that applies to that violation. *See* 29 U.S.C. § 255(a). If the violation was not willful, then a two-year statute of limitations applies. *Id.* If the violation was willful, however, a three-year statute of limitations applies. *Id.* As a result, employees can collect three years of unpaid wages and/or overtime compensation.

The City argues that the evidence was insufficient to support the jury's determination that it willfully violated the statute. The record indicates that the City waived its sufficiency claim. Although the City raised this issue in a Rule 50(a) motion for judgment as a matter of law at the close of the fire fighters' case, the City apparently failed to raise the issue again in a Rule 50(a) motion at the close of the evidence (or in a Rule 50(b) post-judgment motion). As we discussed earlier, the City's failure to raise its sufficiency claim could affect our standard of review. The usual standard for sufficiency claims is "whether the evidence has such quality that reasonable and fair-minded persons would reach the same conclusion." *Polanco,* 78 F.3d at 974. When a party failed to raise the claim with the district court, the standard is plain error. Once again, however, we

need not decide this issue, because the City's claim fails under either standard.

Under the FLSA, a violation is "willful" if the employer either "'knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute.'" *Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). To demonstrate that the City's conduct satisfied this standard, the fire fighters presented testimony suggesting that the City knew its method of paying the fire fighters violated the FLSA. Mike Nichols, a lieutenant of fire suppression, testified that in 1995, he met with the assistant fire chief, who admitted he was aware that the fire fighters were being paid incorrectly. Larry Scott, the former director of human resources for the City, testified that the City cancelled a training seminar, which would have informed employees about overtime issues under the FLSA. Scott also stated that, several years ago, he attempted to convince the City to study its pay practices to determine if it was in compliance with the FLSA. He approached Janice Andrews, the city finance director, about this matter, and she in turn talked to the city attorney. Evidently, the city attorney informed Andrews that "we don't even want to open that can of worms." This evidence amply supports the jury's finding that the City "either knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute."

The City, however, contends that the jury's determination was based on incomplete information. The City argues that the district court erred by preventing two witnesses from testifying about the issue of willfulness. We review the district court's decision on this evidentiary question for

abuse of discretion. *Green v. Adm'rs of Tulane Educ. Fund,* 284 F.3d 642, 660 (5th Cir. 2002).

The City wanted to present the testimony of City Manager Kathy Rice. The City stated that Rice would rebut Scott's testimony about the cancelled training seminar on the FLSA. The district court refused to allow Rice to testify because the City had never included Rice on its witness list, and could not provide a valid reason for this omission. As the fire fighters point out, Scott mentioned the cancelled seminar in his deposition, which took place approximately 30 days before trial. Thus, the City was aware of Scott's testimony, and had ample opportunity to include a rebuttal witness on its witness list. The district court did not abuse its discretion in refusing to allow the City to call this witness.

The City also wanted Raymond Cordelli, who formerly directed a division of the Department of Labor that dealt with FLSA issues, to testify about the issue of willfulness. The district court permitted Cordelli to testify, but limited his testimony to general explanations of how the FLSA applies to the payment of fire fighters – *i.e.,* the difference between the adoption of a 28-day and a 14-day work period. The City, however, also wanted Cordelli to testify as an expert on violations of the FLSA. According to the City, Cordelli would have stated that, based on his experience, the City likely did not know that its pay practices violated the FLSA. As the district court observed, it is unclear how Cordelli could have been aware of whether the City "knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute." Cordelli was not an employee of the City, and does not appear to have been a party to any of the events leading up to this litigation. The district court did not abuse its discretion in

preventing Cordelli from testifying about the willfulness issue.

V

The City contends that the district court erred in assessing liquidated damages. Under the FLSA, an employer who violates the overtime provisions is liable not only for the unpaid overtime compensation, but also for "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). At one time, this liquidated damages assessment was mandatory. *See Bernard v. IBP, Inc. of Neb.,* 154 F.3d 259, 267 (5th Cir. 1998). However, the district court can now decline to award such damages (or reduce the amount) if the court concludes that the employer acted in "good faith" and had "reasonable grounds" to believe that its actions complied with the FLSA. 29 U.S.C. § 260. We review the district court's decision to award liquidated damages for abuse of discretion. *See Heidtman v. County of El Paso,* 171 F.3d 1038, 1042 (5th Cir. 1999); *Lee v. Coahoma County, Miss.,* 937 F.2d 220, 226 (5th Cir. 1991).

We have held that an employer "faces a 'substantial burden' of demonstrating good faith and a reasonable belief that its actions did not violate the FLSA." *Bernard,* 154 F.3d at 267 (quoting *Mireles v. Frio Foods, Inc.,* 899 F.2d 1407, 1415 (5th Cir. 1990)). In this case, the jury found the City's actions to be willful. As a result, the City could not show that it acted in good faith. Thus, the district court did not abuse its discretion in assessing liquidated damages. *Cf. Heidtman,* 171 F.3d at 1042 ("Because employers cannot act in good faith based on reasonable grounds when they suspect that they are out of

compliance with the FLSA, it would have been an abuse of discretion if the district court had *not* awarded liquidated damages.") (emphasis in original).[2]

VI

The fire fighters argue that the district court erred in calculating their regular hourly rate of pay and, as a result, improperly calculated damages. We review *de novo* the district court's determination of the regular rate of pay under the FLSA. *See Lee,* 937 F.2d at 224.

In order to determine an employee's overtime compensation, we must calculate the employee's regular hourly rate of pay. In determining the regular rate, we are guided by the regulations provided by the Department of Labor ("DOL"). *See Vela,* 276 F.3d at 667 ("This court must defer to these DOL regulations if . . . they are 'based on a permissible construction of the statute.'") (quoting *Chevron, U.S.A., Inc.*

[2] The City also contends that the district court assessed liquidated damages at the improper time. The City argues that the district court should have assessed liquidated damages *after* offsetting certain overpayments made by the City against any unpaid overtime compensation. (The issue of "offset" is discussed further in this opinion. *See infra.*) If the court had first applied the offset, the fire fighters' damages (before the assessment of liquidated damages) would have been lower. Thus, the corresponding "additional equal amount" of liquidated damages would also have been lower. *See* 29 U.S.C. § 216(b). The district court instead assessed liquidated damages *before* applying the offset, and thus awarded a higher amount of liquidated damages. The City does not cite any case law to support its argument that the district court assessed liquidated damages prematurely. Nor does the statutory language referred to by the City require the district court to apply an offset before awarding liquidated damages. We therefore reject the City's claim.

v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In order to calculate the hourly rate of pay for salaried employees, we must determine their work period salary. *See* 29 C.F.R. § 778.113(b) ("Where the salary covers a period longer than a work week, . . . it must be reduced to its workweek equivalent.").[3] In this case, the jury found that the fire fighters worked 14-day work periods. The district court thus took the fire fighters' yearly salary and divided it by 26 (the number of 14-day work periods in a single year) to determine the fire fighters' work period salary.

The district court then proceeded to calculate the fire fighters' regular hourly rate of pay. The court found that the regular rate must be determined by dividing the work period salary by the number of hours actually worked in a particular work period. The court observed that, because of the fire fighters' alternating schedule (24 hours on-duty, 48 hours off-duty), they did not work the same number of hours in every two-week work period. In a six-week period, the fire fighters would work 120 hours in one 14-day work period; 120 hours in another 14-day work period; and 96 hours in the remaining 14-day work period. The district court calculated the regular rate of pay for the 120-hour work periods by dividing by 120. The court determined the

[3] 29 C.F.R. Part 778 describes the method of calculating the regular rate of pay for individuals who are employed on a "work week" basis. Fire suppression personnel who are employed under § 207(k) are, of course, employed on a "work period" basis. The regulations provide that employers (and courts) should calculate the regular rate for § 207(k) employees by using the formulas in 29 C.F.R. Part 778, and simply substituting the applicable "work period" for "workweek." 29 C.F.R. § 553.233.

regular rate for the 96-hour work periods by dividing by 96.

The fire fighters argue that the district court used the wrong divisor. They contend that the district court erred by including overtime hours in the divisor. They claim that, for all work periods, the court should have divided by 106: the maximum number of non-overtime hours that fire fighters can work in a 14-day work period. *See* 29 C.F.R. § 553.201(a); *id.* § 553.230(a).

The fire fighters rely on our decision in *Lee v. Coahoma County, Mississippi,* 937 F.2d 220 (5th Cir. 1991), *corrected by Lee v. Coahoma County, Mississippi,* 37 F.3d 1068, 1069 (5th Cir. 1993). In *Lee,* we explained that, in determining the regular rate of pay, the district court should divide the work period salary "by the number of regular hours which may be worked in that work period[.]" 37 F.3d at 1069. The fire fighters interpret the term "regular hours" to mean non-overtime hours.

However, the fire fighters misinterpret our holding in *Lee.* We did not state that "regular hours" can only include non-overtime hours. On the contrary, we believe that the term "regular hours" is more appropriately defined as the hours normally and regularly worked by an employee. *Cf.* 29 C.F.R. § 553.224 (defining "work period" as "any established and regularly recurring period of work"). In the case of the fire fighters, who work 120 hours in two out of every three 14-day work periods, they normally and regularly work overtime. Thus, the district court did not err in calculating the fire fighters' regular rate by dividing their work period salary by both non-overtime and overtime hours. *See* 29 C.F.R. § 778.325 (observing that some employees' regular schedules include overtime hours);

Aaron v. City of Wichita, Kan., 54 F.3d 652, 656 (10th Cir. 1995).

Indeed, the district court was required to include all the hours regularly worked by the fire fighters in the divisor. Under the FLSA, the regular hourly rate for salaried employees "is computed by dividing the salary *by the number of hours which the salary is intended to compensate.*" 29 C.F.R. § 778.113(a) (emphasis added); *see Adams v. Dept. of Juvenile Justice of City of New York*, 143 F.3d 61, 66 (2d Cir. 1998); *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1283 (4th Cir. 1996); *Aaron*, 54 F.3d at 655. We can determine how many hours the salary "is intended to compensate" by examining what happens under the contract. *See* 29 C.F.R. § 778.108 ("The 'regular rate' of pay . . . cannot be left to a declaration by the parties . . . ; it must be drawn from what happens under the employment contract."); *Adams*, 143 F.3d at 67. In this case, the fire fighters have for a number of years worked according to the 120-120-96-hour schedule, and they have consistently accepted two-week paychecks as compensation for this work. Although, as the City now admits, these paychecks did not adequately compensate the fire fighters for their overtime in every work period, these paychecks were nonetheless *intended* to compensate the fire fighters for all of their regularly scheduled (non-overtime and overtime) hours. *Cf. Monahan*, 95 F.3d at 1279 n.20 ("It is difficult to believe that the [employees] would blindly accept these positions unaware of the hours they would be expected to work or can now claim they were unaware of those hours in spite of their continued and repeated acceptance of paychecks under the same scheduling cycle."). Thus, the district court, when calculating the fire fighters' hourly rate, correctly included both non-overtime

and overtime hours in the divisor. Therefore, we find no error in the district court's method of calculating the fire fighters' overtime pay.[4]

The fire fighters also claim that the district court erred in its calculation of damages by crediting the account summaries prepared by the City's accountant over

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[4] The fire fighters contend that the district court erred by using the "fluctuating method" to calculate their overtime compensation. *See* 29 C.F.R. § 778.114 (explaining the fluctuating method); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 633 (5th Cir. 2001) (same). Under the fluctuating method, an employee's work period salary compensates him for all of his non-overtime hours, and part of his overtime hours. As a result, the employee's overtime hours are multiplied only by one-half (instead of one and one-half) the regular rate of pay. *Id.* In other words, the employee, instead of receiving "time and a half" for his overtime hours, receives only "a half." *See Heder v. City of Two Rivers, Wis.*, 295 F.3d 777, 779 (7th Cir. 2002) (observing that, if fire fighters work a fluctuating workweek, "their standard compensation covers *any* number of hours, so that the only statutorily required payment is the 50% premium for overtime") (emphasis in original).

The fire fighters correctly observe that the fluctuating method would be inappropriate in this case. An employer can use this method only if the employer and employee have a "clear mutual understanding" that the method applies. 29 C.F.R. 778.114(a); *Heder*, 295 F.3d at 780; *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 39 (1st Cir. 1999). In this case, neither party has presented evidence of such a "clear mutual understanding."

However, the fire fighters are incorrect to say that the district court applied the fluctuating method in this case. The district court did not calculate the fire fighters' damages by multiplying their overtime hours by one-half of their regular rate of pay. Instead, the district court multiplied the fire fighters' overtime hours (*i.e.*, the hours exceeding 106 in a 14-day work period) by one-and-one half of their regular rate of pay. The district court thus used the usual method of calculating overtime pay, not the less common fluctuating method. *See* 29 C.F.R. § 778.107 ("The general overtime pay standard . . . requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed[.]").

those of the fire fighters' accountant. In the absence of an error of law, we review the district court's award of damages for clear error. *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 447 (5th Cir. 2002). In this case, the fire fighters' accountant prepared her account summaries by relying on data compiled by the fire fighters' counsel and his assistants. The fire fighters' accountant failed to audit the fire fighters' payroll records herself, and thus failed to verify the data upon which her conclusions were based. The City's accountant, by contrast, did conduct her own audit. As a result, the district court found the account summaries prepared by the City's accountant to be more reliable. We find no error (much less clear error) in the district court's determination.

VII

The fire fighters contend that the district court erred in offsetting the overpayments made by the City in some work periods against the overall damages owed by the City. The fire fighters contend that the district court did not have the authority under state or federal law to apply the offset. We review this issue of law *de novo*.

In determining the plaintiffs' overtime pay, the district court found that the City's method of calculating overtime compensation resulted in small deficiencies (for example, $6.60)[5] in the work periods in which the fire fighters worked 120 hours. However, the City's method resulted in considerable overpayments ($126.20) in the work periods

[5] We refer to the example provided by the district court: the overtime compensation owed to Joe Singer in one six-week period.

in which the fire fighters worked 96 hours. The district court stated that "permitting the Plaintiffs to receive a windfall by not taking into account the City's overpayment would result in unjust enrichment." The court thus offset the overpayments made by the City in the 96-hour work periods against the shortfalls in the 120-hour work periods.[6]

The fire fighters insist that the district court did not have the authority to apply this offset. To the extent that the district court relied on the state law doctrine of "unjust enrichment," we agree with the fire fighters. Under Texas law, unjust enrichment is a narrow remedy. The state courts have made clear that "[u]njust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss . . . or because the benefits to the person sought to be charged amount to a *windfall.*" *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 891 (Tex.1998) (emphasis added) (internal quotation marks omitted); *Heldenfels Bros., Inc. v. City of Corpus Christi,* 832 S.W.2d 39, 42 (Tex. 1992) (same); *see Acad. Corp. v. Interior Buildout &*

[6] We note that the City owed the fire fighters four years of unpaid overtime compensation. Although the applicable limitations period under the FLSA was three years, the limitations period under state law was four years. *See* TEX. LOC. GOV'T CODE ANN. § 142.0015; TEX. CIV. PRAC. & REM. CODE ANN. § 16.051; *see also* 29 U.S.C. § 218(a) (permitting states to adopt labor standards that are more stringent than the FLSA). The district court offset the City's overpayments against all four years of unpaid overtime compensation.

Turnkey Constr., Inc., 21 S.W.3d 732, 741 (Tex. App. 2000) (same).[7]

The fire fighters also contend that the district court lacked the authority under the FLSA to apply the offset. The fire fighters appear to assume that the district court acted pursuant to § 207(h) of the FLSA. That provision states that employers may offset certain overtime premiums against overtime compensation due under the statute. *See* 29 U.S.C. § 207(h)(2). The fire fighters, relying on several cases interpreting § 207(h), argue that the provision does not permit a district court to offset overpayments made in some work periods against shortfalls in other

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[7] Even if the district court could apply the doctrine of unjust enrichment in this case, the court used the wrong statute of limitations. The Texas Supreme Court has stated that the statute of limitations for unjust enrichment claims is two years. *HECI Exploration Co.*, 982 S.W.2d at 885. Thus, the district court could have applied the offset only to two years of violations.

Although we conclude that the district court could not rely on the state law doctrine of unjust enrichment, we do not hold that the district court lacked the authority to apply an offset to the four years of state law violations. We note that the applicable provision of the Texas code adopts the same overtime standards for fire fighters as the FLSA. *See* TEX. LOC. GOV'T CODE ANN. § 142.0015; *see also City of San Antonio v. Aguilar*, 696 S.W.2d 648, 655 (Tex. App. 1985) (holding, when construing an earlier version of § 142.0015, that state law "should emulate the method of overtime calculation done under the Fair Labor Standards Act"). It follows that, if the FLSA permits an offset, then so does Texas state law. *Cf. Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 920 (Tex. App. 1999) (noting that "[a]n offset against damages applies to prevent a plaintiff from obtaining more than one recovery for the same injury") (internal quotation marks omitted). As discussed in the text, we hold that the FLSA does not prohibit the district court from applying an offset. We therefore also conclude that the district court could apply the offset to all of the City's overtime obligations – whether owed under state or federal law.

work periods. *See Herman v. Fabri-Ctrs. of Am., Inc.*, 308 F.3d 580, 590 (6th Cir. 2002) ("[P]remium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid."); *Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1149 (7th Cir. 2001) (holding that "the district court erred in allowing the blanket application of all [§ 207] premium payments to all overtime liabilities"); *Nolan v. City of Chicago*, 125 F.Supp.2d 324, 331 (N.D.Ill. 2000) (finding that "offsets [under § 207(e)(5) and (6)] should be calculated on a period by period basis"); *but see Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) (stating that an employer should be permitted to offset "*all* previously paid overtime premiums ... against overtime compensation found to be due") (emphasis in original).

As the fire fighters themselves point out, however, § 207(h) does not apply in this case. *See* Brief of Appellants Singer et al. at 39. Section 207(h) refers to the overtime premiums listed in § 207(e) of the FLSA. That provision refers to payments that are *not included* in determining the regular rate of pay. *See* 29 U.S.C. § 207(e).[8] These

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[8] Section 207(e) states that the " 'regular rate' ... shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall *not* be deemed to include" the following overtime premiums:

> (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(Continued on following page)

overtime premiums are extra payments made by employers. These sums are excluded from the total salary (from which the regular hourly rate is calculated) so that they do not improperly inflate the hourly rate. *See Bay Ridge Operating Co. v. Aaron,* 334 U.S. 446, 464 (1948) ("If [an] overtime premium is included in the weekly pay check that must be deducted before the division. . . . To permit [the] overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium – a pyramiding that Congress could not have intended."). In this case, the district court included the overpayments made to the firefighters in determining the fire fighters' regular rate of pay. The court did not treat the overpayments as "overtime premiums." Therefore, § 207(h), and the cases interpreting it, are inapplicable.

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(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,) where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek[.]

29 U.S.C. § 207(e)(5),(6),(7) (emphasis added) (footnote omitted).

The fire fighters nonetheless contend that the district court cannot offset overpayments in some work periods against shortfalls in other work periods. The fire fighters rely on a provision of the regulations stating that "[t]he general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. § 778.106. The provision makes clear that the payment of overtime compensation may be delayed only for a period that is "reasonably necessary for the employer to compute and arrange for payment[.]" *Id.* The fire fighters insist that the district court's order violates this provision by permitting the City to pay its overtime obligations "at a time far removed from when the overtime was due[.]" Brief of Appellants Singer et al. at 42.

The fire fighters mischaracterize the nature of the offset. The district court did not permit the City to pay its overtime obligations years after they were due. Instead, the court simply acknowledged that the City *already paid* the bulk of its overtime obligations. When the City overpaid its employees in the 96-hour periods, it essentially compensated the employees for the shortfalls in the 120-hour periods.

Of course, as the fire fighters point out, if those overpayments are seen as "late" payments of overtime compensation, they would nonetheless violate the FLSA. As § 778.106 makes clear, an employer violates the FLSA not only by failing to pay overtime compensation but also by delaying the payment of overtime compensation. *See Halferty v. Pulse Drug Co., Inc.,* 821 F.2d 261, 271 (5th Cir. 1987) ("A cause of action accrues at each regular payday immediately following the work period during which the

services were rendered for which the wage or overtime compensation is claimed.").

However, we need not view the overpayments made by the City during the 96-hour work periods as "late" payments of overtime compensation. It seems more appropriate to view those overpayments as *pre*-payments: the City pre-paid the fire fighters to compensate them for the shortfalls they would receive in subsequent 120-hour work periods. Although § 778.106 states that overtime compensation "generally" should be paid in the same work period in which the work is performed, the provision does not prohibit an employer from paying overtime compensation in advance. Indeed, in cases such as the present one, in which the employees regularly work overtime, it seems logical that an employer would choose to pre-pay its employees for that regularly scheduled work. Thus, we hold that the district court did not err in offsetting the overpayments paid to the fire fighters in some work periods against the shortfalls in other work periods.[9]

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[9] Our decision in *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974), *rev'd on other grounds by McLaughlin*, 486 U.S. at 130, 134 n.10, is not to the contrary. In that case, we stated that "[s]et-offs against back pay awards deprive the employee of the 'cash in hand' contemplated by the Act, and are therefore inappropriate in any proceeding brought to enforce the FLSA minimum wage and overtime provisions [.]" *Id.* at 4. It is important, however, to recognize the context of our statement. In that case, the offsets permitted by the district court caused "the final awards to many of [the] defendants' workers [to drop] below the statutory minimum[.]" *Id.* at 3. In this case, no party contends that the offset might cause the fire fighters' wages to fall below the statutory minimum wage. Thus, *Brennan* does not prohibit the district court from applying an offset in this case. *See Mullins v. Howard County, Md.*, 730 F.Supp. 667, 673 (D. Md. 1990) (recognizing that "[t]he [*Brennan v.*]

(Continued on following page)

VIII

The City argues that the district court erred in calculating attorney's fees.[10] We review the district court's award of attorney's fees for abuse of discretion and its factual findings for clear error. *Mathis v. Exxon Corp.*, 302 F.3d 448, 461-62 (5th Cir. 2002).

The district court correctly applied the lodestar method in calculating attorney's fees. *See Heidtman*, 171 F.3d at 1043 (confirming that the lodestar method applies in cases arising under the FLSA). The lodestar is "calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." *Id.* After the district court determined this figure, the court examined whether, based on the factors mentioned in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), it should increase or decrease the lodestar.[11] The district court found that three factors (the novelty and difficulty of the questions presented; the

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Heard case stands for the principle that set-offs may not result in subminimum wage payments to an employee").

[10] The FLSA requires an employer who violates the statute to pay attorney's fees. *See* 29 U.S.C. § 216(b).

[11] The *Johnson* factors are: (1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Heidtman*, 171 F.3d at 1043 n.5 (citing *Johnson*, 488 F.2d at 717-19).

skill required to perform the legal services properly; and the experience, reputation, and ability of the fire fighters' attorney) "weigh[ed] in favor of a moderate upward adjustment." The court also observed, however, that another factor (the amount involved and the result obtained) "weigh[ed] in favor of a downward adjustment."[12] As a result, the court did not alter the lodestar amount.

The City argues that the district court should have assessed attorney's fees on an individual basis. The City contends that, if the district court had followed this method, the award would have been lower. The City observes that, after the district court applied the offset, a number of individual plaintiffs were not awarded any damages. The City reasons that, because "attorney's fees awarded under the FLSA are typically assessed based upon the amount of the monetary recovery a plaintiff receives in the matter," the district court would have awarded a lower amount if it had awarded fees on a plaintiff-by-plaintiff basis. Brief of Appellee/Cross Appellant City of Waco at 55.

The City essentially contends that the district court should have reduced the lodestar because the fire fighters received a much lower damage award than they sought. As the City apparently recognizes, we have stated that "[t]he most critical factor in determining a fee award is the 'degree of success obtained.'" *Romaguera v. Gegenheimer,* 162 F.3d 893, 896 (5th Cir. 1998) (quoting *Hensley v.*

[12] The fire fighters sought over $5 million in damages, but, largely because of the offset applied by the district court, recovered approximately $180,000 in damages.

Eckerhart, 461 U.S. 424, 436 (1983)). In this case, because the fire fighters sought $5 million in damages, and collected only $180,000, their monetary success was limited. However, this fact did not require the district court to reduce the lodestar. We have made clear that "while a low damages award is one factor which a district court may consider in setting the amount of attorney's fees, this factor alone should not lead the district court to reduce a fee award." *Hollowell v. Orleans Reg'l Hosp. LLC,* 217 F.3d 379, 392 (5th Cir. 2000); *see Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 558 (7th Cir. 1999) (observing, in a lawsuit initiated under the FLSA, that "an attorney's failure to obtain every dollar sought on behalf of his client does not automatically mean that the modified lodestar amount should be reduced").

In this case, the district court considered lowering the attorney's fees due to the fire fighters low recovery, but declined to do so. *Cf. Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 329 (5th Cir. 1995) (observing that the district court's lodestar analysis is inspected primarily to ensure that "the court sufficiently *considered* the appropriate criteria") (emphasis in original). The district court found that, because other factors weighed in favor of an upward departure, it would have been inappropriate to reduce the lodestar in this case. The district court did not abuse its discretion in declining to adjust the lodestar. *Cf. Heidtman,* 171 F.3d at 1044 (noting the "strong presumption that the lodestar award is the reasonable fee").

For the above reasons, the judgment of the district court is AFFIRMED.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APR 30 2003*

* District Judge of the Eastern District of Texas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

JOSEPH SINGER and CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated, Plaintiffs,	§	**CIVIL ACTION NO. W-99-CA-296**
v.	§	
CITY OF WACO, TEXAS, Defendant.	§	

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DAMAGES[1]

(Filed Sep. 14, 2001)

The Court considers this case following a trial before the Court on the issue of damages which was held on July 12, 2001. The Court had earlier granted the parties' request that the issue of damages be bifurcated from the liability issues. Therefore, a trial before a jury was held regarding liability under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA") and Texas Local Government

[1] The Court entered its findings of fact and conclusions of law regarding money damages due under the FLSA and Texas Local Government Code, Chapter 142 on August 24, 2001. At that time the Court instructed the City to submit payroll records for each Plaintiff for each pay period between August 26, 2000 and August 25, 2001. The City has made its submission and these amended findings of fact and conclusions of law reflect Plaintiffs' damages between October 1, 1995 and August 25, 2001.

Code section 142.0015 on April 9-12, 2001. The jury found that the City established a 14-day work period under section 207(k) of the FLSA for its Fire Suppression Employees. The jury also found that the City acted willfully when it failed to properly pay the Plaintiffs overtime due under the FLSA, and further found that the City lacked a good faith and reasonable belief that its conduct did not violate the FLSA.

Findings of Fact

1. This lawsuit was filed on September 28, 1999.

2. Plaintiffs in the case are 180 former or current employees of the Waco Fire Department. Defendant City of Waco is a Texas municipality.

3. There are two separate categories of Plaintiffs involved in this case – fire suppression employees and fire alarm operator employees.

4. Following the jury trial on the liability issues, Ms. Dora Dyson was hired by the Plaintiffs to conduct an accounting review of the payroll records produced by the City for each of the Plaintiffs.

5. Dyson is a Certified Public Accountant with extensive experience, training and knowledge of accounting procedures and audits.

6. Dyson's work for the Plaintiffs involved analyzing accounting summary sheets prepared for each Plaintiff for each pay period between October 1, 1995 and August 24, 2000.

7. Plaintiffs' counsel prepared the accounting summary sheets for Dyson.

8. Plaintiffs' counsel testified that he and his staff prepared the accounting summary sheets for each Plaintiff for each pay period from each Plaintiff's employment and payroll records provided to Plaintiffs' counsel during discovery.

9. The data on the accounting summary sheets provided to Dyson were derived from three primary sources – each Plaintiff's "service record," "check history listing detail," and "P-sheet."

10. A "service record" is that record kept by the City which indicates each Plaintiff's monthly salary and any add-on pay (e.g., educational incentive pay, certification pay, and longevity pay), as well as each Plaintiff's hire date and time-in-grade.

11. A "check history listing detail" is basically the check stub given to each Plaintiff that indicates the gross and net pay for each pay period, and indicates the employee's add-on pay for a particular pay period.

12. A "P-sheet" is an attendance sheet upon which each Plaintiff marks "P" to indicate that the Plaintiff was present during a particular shift, "S" to indicate the use of sick leave during that shift, or "V" to indicate the use of vacation time.

13. Dyson conducted what is termed by accountants and auditors as an "agreed upon procedure." In this procedure, the accountant takes raw data provided by the client and follows a set of rules or instructions, also provided by the client, to reach an outcome.

14. In this case, Dyson was to determine the payroll amounts the City should have paid each Plaintiff in each 14-day pay period from October 1, 1995 until August 24, 2000 ("correct gross pay"). Dyson was then to determine the dollar amount of underpayments owed by the City to each Plaintiff in each 14-day pay period

by subtracting the actual gross pay for each Plaintiff in each 14-day pay period from the correct gross pay. Dyson was then to prepare a report that indicated the amount of money damages the City owed each Plaintiff in each pay period.

15. Plaintiffs requested that Dyson prepare a report for each year of the liability period. Dy examined the pay periods from October 1995 mber 1996 ("Year 1"), October 1996 to Se 997 ("Year 2"), October 1997 to September r 3"), October 1998 to September 1999 ("Y), and October 1999 to September 2000 ("Year 5"

16. Dyson stated that she followed these instructions provided to her by the Plaintiffs:[2]

    a. First, determine the work period salary. Dyson stated that she took each employee's monthly pay (which is the sum of all the employee's hourly pay, certification pay, education incentive pay, and longevity pay for the month) and multiplied this amount by 12 months to determine a yearly salary. Dyson next divided the yearly salary by 26 to determine the work period salary.

    b. Next, determine the regular rate of pay. Dyson stated that she divided the work period salary by 106 (fire suppression employees) or 40 (fire alarm operator employees) to determine the regular rate of pay for each pay period.

    c. Next, determine the overtime rate of pay. Dyson testified that she multiplied the regular rate of pay by 1.5 to determine the overtime rate of pay.

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[2] *See* Plaintiffs' Exhibit 44.

d. Next, determine the correct gross pay. Dyson stated that she multiplied the regular rate of pay by the number of regular hours in each work period. Dyson also multiplied the correct overtime rate by the number of overtime hours in each pay period. Dyson then added these two totals together to determine the correct gross pay.

e. Finally, determine the amount owed to each employee. Dyson stated that she subtracted the actual gross pay that the City paid each employee from the correct gross pay to arrive at the amount the City owed each employee.

f. Dyson stated that she followed these instructions for each Plaintiff for each pay period in Year 1 through Year 5.

17. Having conducted this agreed upon procedure for each Plaintiff in each pay period in Year 1 through Year 5, Dyson prepared a report for each Plaintiff that detailed the difference between the correct gross pay and the actual gross pay in each pay period. Dyson also prepared a summary report for each Plaintiff that reflected the underpayments in Year 1 through Year 5.[3]

18. Dyson also stated that she ignored any work period in which the City overpaid the employee. Dyson stated that she indicated an overpayment by entering "zero" on the summary sheet for any work period in which there was an overpayment.

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[3] *See* Plaintiffs' Exhibit 48.

19. Dyson cited as an example of the work she performed for each Plaintiff, the report she prepared for Mr. Joe Singer's payroll records.[4]

20. Dyson stated that she neither audited each Plaintiffs payroll records, nor did she actually verify the data in the accounting summary sheets provided to and prepared for her by Plaintiffs' counsel.

21. Upon review of Dyson's reports, the City noted some discrepancies in the data which Dyson used to prepare her reports. Some of these errors were corrected by Dyson, and others were not.

22. Ms. Gail Cross is currently a Financial Supervisor for the City. Cross was promoted to this position on June 1, 2001. Prior to her promotion, Cross was an Internal Auditor for the City. She had served as an Internal Auditor for more than 17 years.

23. As an Internal Auditor, Cross reported directly to the City Director of Budget and Auditing.

24. Although there are no licensing, certification or training requirements to be an internal auditor in the State of Texas, the City required Cross to undergo at least 80 hours of training per year to continue to be an Internal Auditor for the City.

25. Cross stated that during her time as an Internal Auditor, she conducted between one and fifteen audits per year for the City, including some payroll audits.

26. Cross stated that a payroll audit involved primarily the task of verification of time sheet entries, pay histories, service records, and P-sheets.

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[4] *See* Plaintiffs' Exhibit 49.

27. Cross stated that she had never audited the payroll practices of the Waco Fire Department prior to this lawsuit.

28. Cross stated that she conducted an audit of each Plaintiff's payroll records. Cross stated that she verified, for each Plaintiff, the number of hours actually worked in each pay period and the amount of money each Plaintiff actually received for each pay period in Year 1 through Year 5.

29. Cross stated that she did a parallel calculation for each Plaintiff's payroll records. A parallel calculation is the accounting term for "checking your work." Cross then prepared reports similar to the reports Dyson prepared at the direction of the Plaintiffs.[5]

30. Cross also prepared reports of her parallel calculation based on a 28-day work period instead of a 14-day work period.[6]

31. Following the entry of the Court's Findings of Fact and Conclusions of Law, Dyson performed these calculations for the pay periods between August 26, 2000 until August 25, 2001. Dyson summarized these calculations in Appendix B to Defendant's Supplemental Submission of Damage Calculations

32. The Court finds the account summaries prepared by Cross to be more credible than the summaries prepared by Dyson. The Court makes this finding based on Cross's verification of each datum used in the

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[5] *See* Defendant's Exhibits 1-4.

[6] *See* Defendant's Exhibits 5-8. Defendant offered these reports merely as an offer of proof in order to preserve its argument that the City conclusively established a 28-day work period pursuant to section 207(k) when Chief Mercer's Memorandum was circulated in 1985.

summary she prepared. Dyson merely utilized data that was provided to her by Plaintiffs' counsel.

Any of the foregoing findings of fact which may be more properly considered a conclusion of law shall be so considered.

Conclusions of Law

1. The liability period for a claim made pursuant to Texas Local Government Code, Chapter 142 is the four-year period prior to the filing of the lawsuit. *See* TEX. CIV. PRAC. & REM. CODE § 16.051.

2. The liability period for a willful FLSA violation period is the three-year period prior to the filing of the lawsuit. *See* 29 U.S.C. § 255(a).

3. The statute of limitations on the City's counterclaim for unjust enrichment is the four-year period prior to the filing of the lawsuit. *See* TEX. CIV. PRAC. & REM. CODE § 16.051.

Fire Suppression Plaintiffs

4. Because the jury found that the City established a 14-day work period for its fire suppression employees pursuant to 29 U.S.C. § 207(k), the fire suppression Plaintiffs are not entitled to overtime until after they have worked 106 hours in a given 14-day work period. There are twenty-six 14-day work periods in each year.

5. The first step in determining the correct overtime pay due to each Fire Suppression Plaintiff is to determine the correct regular hourly rate of pay for each pay period.

6. According to Department of Labor ("DOL") regulations, an employee's regular hourly rate of pay will be calculated by dividing the "work period equivalent wage" by the "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 778.113(a) & (b); Secretary of Labor Letter Rulings (Nov. 19, 1986; May 18, 1988).

7. The "work period equivalent wage" is determined by taking an employee's yearly salary and dividing that figure by the number of work periods in each year. 29 C.F.R. § 778.113(a) & (b).

8. Once the work period equivalent wage is determined, the next step is to divide the work period equivalent wage by "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 778.113(a) & (b).

9. The "number of hours in the work period which the salary is intended to compensate" equates to the total number of hours an employee works in the work period. *Aaron v. City of Wichita*, 54 F.3d 652, 655 (10th Cir. 1995) (Reavley, J.); 29 C.F.R. § 778.325.

10. According to the DOL, a fire suppression employee who is on a rotating schedule of 24 hours on-duty, followed by 48 hours off-duty will work 120 hours in Work Period 1, 120 hours in Work Period 2, and 96 hours in Work Period 3 before the cycle will repeat itself.

11. Thus, it would appear that in Work Periods 1 and 2, the divisor is the total number of hours worked in each work period, ordinarily 120 hours. Since the fire suppression employees are entitled to overtime pay after working 106 hours in each 14-day work period, 14 of the 120 hours in Work Periods 1 and 2 are overtime hours. The fire suppression employees are thus entitled, in Work Periods 1 and 2, to pay at the regular

hourly rate for up to 106 hours, and to pay at the overtime rate for any hours actually worked beyond 106 hours.

12. In Work Period 3, the fire suppression employees are entitled to pay at the regular rate for all the hours actually worked in each work period, ordinarily 96 hours.

13. Applying these conclusions to the payroll records of Mr. Singer (as an example only), the Court finds that the summary provided to the Court by the Plaintiffs utilized the incorrect divisor in determining the regular hourly rate of pay under the FLSA. In examining Mr. Singer's payroll records, the Court notes that the work period beginning on October 13, 1996 is equivalent to Work Period 1 – Singer was scheduled to work 120 hours. The work period beginning on October 27, 1996 is equivalent to Work Period 2 – Singer was again scheduled to work 120 hours. Finally, the work period beginning on November 10, 1996 is equivalent to Work Period 3 – Singer was scheduled to work 96 hours.

14. According to the City's payroll records for Singer, he received, during the three work periods mentioned above, a monthly salary of $2,710.10, longevity pay of $60.00, and education certification pay of $50.00. *See* Plaintiffs' Exhibit 29, Service Record for Joseph Singer.

15. Singer's yearly salary is determined using the following formula: (Monthly Salary + Longevity Pay + Educational Certification Pay) x 12. Mr. Singer's work period equivalent salary is then determined by dividing his yearly salary by the number of work periods in

a year. Applying these formulae, Singer's work period equivalent salary is $1,301.58.[7]

16. In Work Period 1, Mr. Singer actually worked 4 shifts and called in sick for 1 shift for a total of 120 hours. In Work Period 2, Mr. Singer actually worked 1 shift and took vacation for 4 shifts for a total of 120 hours. Finally, during Work Period 3, Mr. Singer worked four shifts for a total of 96 hours. *See* Plaintiffs' Exhibit 31, P-Sheets for Joseph Singer.

17. Singer's regular rate of pay for Work Period 1 is determined by dividing the work period equivalent wage by the actual number of hours worked in Work Period 1. Applying this formula, Singer's regular rate of pay for Work Periods 1 and 2 is $11.16.[8] Singer's regular rate of pay for Work Period 3 is $13.55.[9]

18. Singer is thus entitled to regular pay of $1,182.96 for 106 hours of regular time, and $234.36 for 14 hours of overtime, for a total of $1,417.32 in Work Period 1.[10] In Work Period 2, Singer is entitled to $1,182.96 for 106 hours of regular time, and $234.36 for 14 hours of overtime, for a total of $1,417.32 in Work Period 2.[11] Singer is entitled to $1,300.80 for 96 hours of regular time in Work Period 3.[12] Singer is not entitled to overtime pay in Work Period 3 because he did not work more than 106 hours during the 14-day work period.

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[7] [($2,791.01 + 60.00 + 50.00) x 12] ÷ 26 = $1,338.93.

[8] $1,338.93 ÷ 120 = $11.16.

[9] $1,338.93 ÷ 96 = $13.55

[10] ($11.16 x 106) + (1.5 x $11.16 x 14) = $1,417.32.

[11] ($11.16 x 106) + (1.5 x $11.16 x 14) = $1,417.32.

[12] $13.55 x 96 = $1,300.80.

19. Examining the check history detail listings for Singer for these three Work Periods indicates that Singer was paid $1,410.72 for Work Period 1, $1,392.17 for Work Period 2, and $1,427.00 in Work Period 3. *See* Plaintiffs' Exhibit 33, Check History Listing Detail for Joseph Singer.

20. Thus, it appears that Singer was underpaid $6.60 in Work Period 1, underpaid $6.60 in Work Period 2, and overpaid $126.20 in Work Period 3.

21. Plaintiff's calculations for these three Work Periods for Mr. Singer are derived from dividing the work period equivalent wage by 106. Plaintiffs' method of calculating the regular rate of pay improperly inflates the hourly rate of pay because it fails to take into account the number of hours actually worked in each pay period. When an employee works 120 hours in a work period, the regular rate is inflated by using 106 as the divisor in determining the regular rate of pay. Conversely, the regular rate is depressed by using 106 as the divisor when an employee works only 96 hours in a work period.

22. The FLSA requires a fire suppression employee's regular rate of pay for a work period to be determined by utilizing the number of hours actually worked in that particular work period as the divisor. *Aaron*, 54 F.3d at 656.

23. The summaries provided by the Plaintiffs in Plaintiffs' Exhibit 48 are inherently flawed in this respect, and are therefore insufficient proof of Plaintiffs' damages for the City's willful violation of the FLSA.

24. The summaries provided by the City, however, have utilized the actual hours worked in the work period as

the divisor, and the Court's conclusions are based upon these summaries.[13]

25. The City has also raised the issue of whether it is entitled to offset overpayments made in one pay period against underpayments made in other pay periods.

26. The Court concludes that permitting the Plaintiffs to receive a windfall by not taking into account the City's overpayment would result in unjust enrichment. The purpose of the FLSA is to put the Plaintiffs back into the position they would have been had their pay been correctly calculated. Plaintiffs should not be permitted to profit from the City's error. Plaintiffs are merely entitled to be made whole. The City is liable, however, for liquidated damages in those pay periods in which the Plaintiffs were underpaid because of the jury's finding that the City did not have a good faith and reasonable belief that its pay calculations did not violate the FLSA. Therefore, the Court additionally concludes that any offset is to be made against the total damages amount, rather than the FLSA underpayment amount.

27. The amount of total damages for each Plaintiff should be determined by first determining the amount of underpayments due under the FLSA, and then assessing the liquidated damage requirement of the FLSA, and adding the amount of underpayments due under the Texas Local Government Code. Only then should the overpayments made by the City during the

[13] *See* Appendix 1 to Defendant's Brief Regarding Damages; Defendant's Damages Exhibits 3 & 4; Appendix B and Appendix D to Defendant's Supplemental Submission of Damages Calculations.

four years prior to the filing of the lawsuit be offset against the total damages amount.

28. Attached to these amended findings of fact and conclusions of law is a summary of each fire suppression Plaintiff's damages under the FLSA and the Texas Local Government Code ("Amended Exhibit A"). Amended Exhibit A is a spreadsheet which reflects the outcome of the above listed calculations as they were applied to each Fire Suppression Plaintiff for each work period from October 1, 1995 until August 25, 2001. The Court incorporates by reference Amended Exhibit A verbatim as if set out at length into these amended findings and conclusions.

Fire Alarm Operator Plaintiffs

29. The fire alarm operator employees are entitled to overtime after having worked 40 hours in a given 7-day work week. There are fifty-two 7-day work weeks in each year.

30. According to Department of Labor ("DOL") regulations, an employee's regular hourly rate of pay will be calculated by dividing the "work week equivalent wage" by the "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 778.113(a) & (b); Secretary of Labor Letter Rulings (Nov. 19, 1986; May 18, 1988).

31. The "work week equivalent wage" is determined by taking an employee's yearly salary and dividing that figure by the number of work weeks in each year. 29 C.F.R. § 778.113(a) & (b).

32. The next step in determining the correct overtime pay due to each Fire Alarm Operator Plaintiff is to

determine the correct regular hourly rate of pay for each work week.

33. The regular rate of pay for employees not covered by section 207(k) of the FLSA is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. *Lee v. Coahoma County*, 937 F.2d 220, 224-25 (5th Cir. 1991), *corrected* at 37 F.3d 1068 (5th Cir. 1993); 29 C.F.R. §§ 553.233, 778.107 and 778.113.

34. The overtime rate is then 1½ times the regular rate of pay for all hours beyond 40 worked in a seven-day work week.

35. Applying these conclusions to the payroll records of Mr. Charles Lindorfer, as an example only, the Court notes that Mr. Lindorfer's monthly salary was $3,133.00. He was paid $16.00 in longevity pay for a total monthly pay of $3,149.00. Mr. Lindorfer's yearly salary is thus $37,788.00. Dividing his yearly salary by the number of work weeks in each year, Mr. Lindorfer's weekly salary is $726.69. This figure represents the total wages paid for the first 40 hours Mr. Lindorfer works each week. Thus, the hourly rate of pay is $18.17 and the overtime rate of pay is $27.26.

36. Mr. Lindorfer worked 48 hours (four 12-hour shifts) in the seven-day work week that began on March 2, 1997. Mr. Lindorfer also worked 48 hours in the work week that began on March 9, 1997. Mr. Lindorfer is entitled to 8 hours of overtime pay in week one, and 8 hours of overtime pay in week two.

37. Thus, Mr. Lindorfer is entitled to $726.80 in regular pay for each of the two weeks, and $218.08 in overtime pay for each of the two weeks, for a two workweek total of $1,889.76.

38. During the two weeks that began on March 2, 1997 and ended on March 15, 1997, Mr. Lindorfer was paid

$1,537.54. Thus, Mr. Lindorfer was underpaid during these two work weeks a total of $352.22.

39. Attached to these amended findings of fact and conclusions of law is a summary of each fire alarm operator Plaintiff's damages under the FLSA and the Texas Local Government Code ("Amended Exhibit B"). Amended Exhibit B is a spreadsheet which reflects the outcome of the above listed calculations as they were applied to each Fire Alarm Operator Plaintiff for each work week from October 1, 1995 until August 25, 2001. The Court incorporates by reference Amended Exhibit B verbatim as if set out at length into these amended findings and conclusions.

Any of the foregoing conclusions of law which may be more properly considered as a finding of fact shall be so considered. In light of these findings of fact and conclusions of law it is

ORDERED that Judgment be entered in favor of Plaintiffs. It is further

ORDERED that Defendant City of Waco, Texas pay each Plaintiff money damages as more fully described in Amended Exhibits A and B.

SIGNED this 14th day of September 2001.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

JOSEPH SINGER, ET AL
Plaintiffs

V.

CITY OF WACO, TEXAS
Defendant

JUDGMENT IN A CIVIL CASE

(Filed Sep. 14, 2001)

Case Number:
W-99-CA-296

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issued have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trail or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the Judgment be entered in favor of Plaintiffs. It is further

ORDERED that Defendant City of Waco, Texas pay each Plaintiff money damages as more fully described in Amended Exhibits A and B.

September 14, 2001
Date

/s/ William G. Putnicki
Clerk

/s/ [Illegible]
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOSEPH SINGER and CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated, Plaintiffs,	§	**CIVIL ACTION NO. W-99-CA-296**
v.	§	
CITY OF WACO, TEXAS, Defendant.	§	

ORDER

(Filed Oct. 25, 2001)

Before the Court is the Plaintiffs' motion to amend the Court's findings of fact and conclusions of law entered on September 14, 2001. The Plaintiffs urge the Court to correct several findings of fact, and numerous conclusions of law. The requested amendments to the Court's conclusions of law would amount to a wholesale abandonment of the court's conclusions regarding damages. The requested amendments to the factual findings, however, correct typographical or clerical errors. Having reviewed the Plaintiffs' requests, the Court finds that they should be **GRANTED IN PART** and **DENIED IN PART**.

Plaintiffs' first request is to include a "missing" plaintiff in the Court's findings regarding damages. Plaintiff W.C. Monroe is a proper plaintiff, and the Court should have included findings regarding Mr. Monroe's damages in Amended Exhibit A attached to the Court's

Amended Findings of Fact and Conclusions of Law. Therefore, the Court finds that Amended Exhibit A, should be further amended to include findings regarding the damages of Plaintiff W.C. Monroe. The Court incorporates by reference the attached Second Amended Exhibit A verbatim as if set out at length into the Court's amended findings and conclusions regarding damages.

Plaintiffs' second request relates to Finding of Fact Nos. 31 and 32. Plaintiffs point out that the Court erroneously refers to the Defendant's expert witness, Ms. Cross, as Ms. Dyson, the Plaintiffs' expert witness. Plaintiffs' also complain that the Court's credibility determination regarding the calculations of the Plaintiffs' damages is incorrect. The Court believes that the method which Ms. Cross utilized in making her calculation – personal verification of the data on the Plaintiffs' employment records – as opposed the method Ms. Dyson utilized – reliance upon data provided by Plaintiffs' counsel, albeit derived from the Plaintiff's employment records – to be more reliable and credible. Accordingly, the Court finds that Findings of Fact Nos. 31 and 32 should be amended as follows:

> 31. Following the entry of the Court's Findings of Fact and Conclusions of Law, Cross performed these calculations for the pay periods between August 26 2000 until August 25, 2001. Cross summarized these calculations in Appendix B to Defendant's Supplemental Submission of Damage Calculations.
>
> 32. The Court finds the account summaries prepared by Cross to be more credible than the summaries prepared by Dyson. The Court makes this finding based on Cross's verification of each datum used in the summary she prepared. Dyson merely utilized

data that was provided to her by Plaintiffs' counsel.

Plaintiffs' third request relates to the court's conclusion regarding the proper formula to use in determining the Plaintiffs' regular rate of pay for each work period. This issue has been continuously litigated in this Court for more than one year. The briefing has been extensive and detailed. The Court is not inclined to reconsider its conclusions regarding the proper method of calculating the regular rate of pay for the Plaintiffs.

Plaintiffs' fourth request relates to Court's conclusion regarding the issue of offset of overpayments made in some work periods against underpayments in other work periods. The Court's conclusion is properly characterized as a conclusion based in equity. The Court concluded that Plaintiffs would be unjustly enriched if the City's overpayments are not taken into account in any manner whatsoever, as the Plaintiffs desire. All the parties agree that the City incorrectly paid its firefighters. All the parties agree that the city paid its firefighters the same salary for each pay period regardless of the number of hours actually worked in that work period. The simple fact remains that Plaintiffs were overpaid during some of these pay periods. Failure to take some account of these overpayments would be inconsistent with the purposes of the FLSA – to put the Plaintiffs in the same position they would have been had they been paid correctly. The offset does not confer a benefit on the City because the Court's conclusions applied the liquidated damage requirement of the FLSA to the underpayment prior to making the offset. To argue that the FLSA prevents the Court from taking into account the overpayment, misconstrues the Court's conclusion. The offset determination made by the Court

was clearly based in equity, and not the strictures of the FLSA.

Plaintiffs' fifth request objects to the Court's consideration of evidence presented by Defendant following entry of the Court's Findings of Fact and Conclusions of Law Regarding Damages on August 24, 2001. Defendant introduced at the hearing on damages a summary of calculations made by Ms. Cross. Plaintiff had an opportunity to cross examine Ms. Cross on the accuracy of the calculations she performed and which were summarized in the Defendant's exhibits. The detail of the summaries provided by Defendant were used by the Court to verify the accuracy of the data reflected in the Defendant's exhibit. Moreover, the data utilized in the Court's Amended Findings of Fact and Conclusions of Law Regarding Damages entered on September 14, 2001 was derived from the summaries provided by the Defendant at the hearing.

Plaintiffs' final request relates to the Fire Alarm Operator Plaintiffs, and essentially argues that the Court's conclusions regarding the plaintiffs' damages are incorrectly based upon a 14-day, 80 hour work period instead of a 7-day, 40-hour work week. Plaintiffs also complain that the Court improperly permitted an offset of overpayments made by the City. For the same reasons as cited above the Court is not inclined to reconsider these conclusions.

Accordingly, it is

ORDERED that Findings of Fact Nos. 31 and 32 in the Court's Amended Findings of Fact and Conclusions of Law Regarding Damages entered on September 14, 2001 be **AMENDED** as described above. It is further

ORDERED that the Court's Second Amended Exhibit A be incorporated by reference into the Court's Amended Findings of Fact and Conclusions of Law Regarding Damages entered on September 14, 2001 in the place of Amended Exhibit A. It is further

ORDERED that the balance of Plaintiffs' motion to amend the Court's findings of fact and conclusions of law is **DENIED**.

SIGNED this 25 day of October 2001.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Second Amended Exhibit A

Fire Suppression Plaintiffs

Plaintiff	Local Government Code Underpayment[1]	FLSA Underpayment[2]	Offset Amount[3]	FLSA Liquidated Damages[4]	Total Damages[5]
Rosalio Amaro	$16.01	$231.41	$66.83	$462.82	$395.99
Carl B. Ammann	$112.09	$4.79	$3,566.97	$9.58	$0.00
Tim Anderson	–	$793.42	$0.00	$1,586.84	$1,586.84
James A. Baker	$0.00	$0.00	$9,010.51	$0.00	$0.00
Michael L. Ball	$171.47	$125.62	$5,549.74	$251.24	$0.00
Chris Ballew	–	$1,098.08	$7,350.61	$2,196.16	$0.00
James Banister	$0.00	$0.00	$12,583.83	$0.00	$0.00
Rob Barlow	$0.00	$248.68	$3,615.40	$497.36	$0.00

[1] Underpayments for the pay periods between October 1, 1995 and September 28, 1996.

[2] Underpayments for the pay periods between September 29, 1996 and August 25, 2001.

[3] Overpayments for the pay periods between October 1, 1995 and August 25, 2001.

[4] FLSA Underpayments x 2.

[5] (FLSA Liquidated Damages + Local Government Code Underpayments) – Offset Amount.

Ulysees C. Barnes, Sr.	$420.11	$193.36	$616.59	$386.72	$190.24
Dewey F. Barnett	$254.33	$799.35	$0.00	$1,598.70	$1,853.03
William Gerald Bass	$51.39	$0.00	$6,444.33	$0.00	$0.00
Robert M. Beechner	$0.00	$0.00	$13,159.73	$0.00	$0.00
Loy T. Beene, Jr.	$246.66	$553.19	$0.00	$1,106.38	$1,353.04
Robin Berger-son	$0.00	$59.33	$2,717.54	$118.66	$0.00
Louis E. Bittle	$263.43	$102.56	$5,803.22	$205.12	$0.00
Shane C. Bivens	$0.00	$541.83	$3,762.74	$1,083.66	$0.00
Allan J. Blahuta	$132.62	$87.46	$8,515.29	$174.92	$0.00
Lowry W. Bonner	$25.72	$1,270.46	$273.71	$2,540.92	$2,292.93
Freddie Bottoms	$14.65	$933.39	$3,412.75	$1,866.78	$0.00
William T. Brandon	$0.00	$310.00	$7,180.16	$620.00	$0.00
Lawrence L. Bright	$0.00	$0.00	$7,749.90	$0.00	$0.00
William C. Bu-chanan	$326.07	$218.04	$115.29	$436.08	$646.86
Thomas E. Buchta	–	$651.79	$208.94	$1,303.58	$1,094.64

Matthew Carey	–	$355.07	$555.31	$710.14	$154.83
Shon Cavett	–	$214.43	$2,947.86	$428.86	$0.00
Clinton L. Coates, Jr.	$446.00	$1,540.54	$0.00	$3,081.08	$3,527.08
Thomas L. Cockrell	$0.00	$0.00	$6,818.17	$0.00	$0.00
Mary Coleman[6]	$0.00	$850.08	$2,917.40	$1,700.16	$0.00
Jerry E. Collier	$44.45	$387.60	$4,199.83	$775.20	$0.00
Kelly Brent Compton	–	$477.67	$216.40	$955.34	$738.94
Ronnie Conder	$0.00	$66.45	$15,839.91	$132.90	$0.00
William L. Conner	$404.85	$0.00	$11,594.84	$0.00	$0.00
Joe P. Cook	$0.00	$0.00	$11,457.61	$0.00	$0.00
James C. Cooper	$446.21	$274.49	$5,121.22	$548.98	$0.00
Robert Covey	–	$0.00	$714.17	$0.00	$0.00
Toby Craig	$17.29	$255.22	$1,984.19	$510.44	$0.00
William J. Crow	$0.00	$0.00	$5,467.04	$0.00	$0.00

[6] Independent Executrix of the Estate of James A. Coleman, III.

Jay Cunningham	–	$276.74	$3.36	$553.48	$550.12
Scott Cupit	–	$351.09	$3,466.61	$702.18	$0.00
Gary L. Davis	$0.00	$0.00	$8,889.69	$0.00	$0.00
Keller Allen Dennis	$250.87	$237.48	$7.03	$474.96	$718.80
Hershel G. Doss	$6.82	$0.00	$4,383.58	$0.00	$0.00
Albert D. Drakes, Sr.	$294.80	$0.00	$7,690.25	$0.00	$0.00
Wade Durbin	–	$635.83	$470.84	$1,271.66	$800.82
Billy L. Eary	$0.00	$0.00	$14,026.16	$0.00	$0.00
Roger S. Fedro	$78.14	$1,335.49	$873.44	$2,670.98	$1,797.54
Jerry Fikes	$403.34	$1,061.27	$731.42	$2,122.54	$1,391.12
Scott Garner	–	$676.86	$416.51	$1,353.72	$937.21
Jerry W. Gautier	$438.69	$724.15	$3,362.34	$1,448.30	$0.00
Tom R. Gent	$0.00	$45.13	$3,984.91	$90.26	$0.00
J.P. Germany	$0.00	$0.00	$17,152.53	$0.00	$0.00
Neal Gibson	$222.74	$198.56	$13,970.38	$397.12	$0.00
Sidney B. Gilliam	$0.00	$0.00	$9,808.71	$0.00	$0.00

David Golden	$0.00	$0.00	$24,848.28	$0.00	$0.00
Dalton Gooden	$0.00	$849.07	$1,572.39	$1,692.14	$119.75
Michael R. Graham	$0.00	$140.05	$6,283.72	$280.10	$0.00
Gerald Groppe	$0.00	$0.00	$11,377.53	$0.00	$0.00
Greg Groppe	$374.36	$0.00	$10,278.25	$0.00	$0.00
Kevin Groppe	$0.00	$475.77	$3,471.06	$951.54	$0.00
J.T. Guthrie	$0.00	$0.00	$8,155.46	$0.00	$0.00
Billy J. Ham-mond	$158.71	$603.82	$4,364.26	$1,207.64	$0.00
David C. Harris	$0.00	$0.00	$20,142.00	$0.00	$0.00
Tracy C. Haw-thorne	$64.92	$993.26	$1,737.41	$1,986.52	$249.11
Ray-mond Helona	$0.00	$0.00	$3,173.23	$0.00	$0.00
Derek Henry	$0.00	$0.00	$10,502.77	$0.00	$0.00
Larry James Hoel-scher	$185.82	$119.32	$0.00	$238.64	$424.46
Dave K. Holmes	$0.00	$744.89	$3,619.39	$1,489.78	$0.00
Ramo-nell James	$0.00	$0.00	$17,711.64	$0.00	$0.00

Raymond L. Jaska	$125.29	$420.72	$7,377.50	$841.44	$0.00
Jessie Johnson[7]	$330.28	$0.00	$1,009.41	$0.00	$0.00
Jon M. Johnson	–	$168.91	$3,934.06	$337.82	$0.00
Michael L. Johnson	$0.00	$0.00	$14,631.92	$0.00	$0.00
Clinton E. Johnston	$289.00	$434.20	$1,277.08	$868.40	$0.00
James W. Jordan	–	$208.21	$919.99	$416.42	$0.00
Duane Kalina	$0.00	$0.00	$12,685.32	$0.00	$0.00
Wade P. Kaminski	$0.00	$30.78	$2,080.72	$61.56	$0.00
Jason Keiningham	–	$480.22	$1,819.16	$960.44	$0.00
Nelson W. Kelinske	$0.00	$2,193.34	$4,684.49	$4,386.68	$0.00
Gregory L. Kistler	$81.73	$0.00	$10,497.82	$0.00	$0.00
Stanley G. Knight	$171.47	$0.00	$8,899.77	$0.00	$0.00

[7] Surviving Spouse of Cardell D. Johnson, Sr.

Edward R. Kocian	$0.00	$0.00	$14,053.85	$0.00	$0.00
Joe Kreder	$0.00	$189.58	$8,402.09	$379.16	$0.00
Dale-forde Lang-stone	$39.20	$431.67	$3,571.89	$863.34	$0.00
Keith D. Lee	$359.14	$1,804.32	$0.00	$3,608.64	$3,967.78
Michael Lenart	$0.00	$0.00	$5,446.18	$0.00	$0.00
John W. Linda	$0.00	$0.00	$7,855.88	$0.00	$0.00
Clarence L. Ling	$0.00	$0.00	$3,264.67	$0.00	$0.00
Gregory A. Lippe	$0.00	$0.00	$15,475.79	$0.00	0.00
George W. Linton	$116.38	$704.75	$986.25	$1,409.50	$539.63
Marcos Lozano	–	$195.59	$134.59	$391.18	$256.59
Scott Luepke	–	$30.78	$5,305.60	$61.56	$0.00
Gernice T. Lykins	$249.75	$213.48	$0.00	$426.96	$676.71
Rick Lynch	–	$545.40	$417.12	$1,090.80	$673.68
Dusty Lynch	$148.95	$764.82	$3,819.79	$1,529.64	$0.00
Darrell Lyons	$436.96	–	$0.00	–	$436.96
James W. McKee	$115.64	$560.35	$1,417.29	$1,120.70	$0.00

Daniel L. McSpadden	$77.01	$0.00	$3,854.92	$0.00	$0.00
Danny Machac	$0.00	$1,119.37	$7,893.62	$2,238.74	$0.00
Larry Joseph Maddox	$112.47	$304.08	$3,252.22	$608.16	$0.00
Braden A. Martin	$50.84	$576.21	$7,544.67	$1,152.42	$0.00
James Mary	–	$50.53	$1,063.54	$101.06	$0.00
Shawn Mason	$13.31	$16.50	$3,635.68	$33.00	$0.00
Jimmie Mauppin	$0.00	$0.00	$19,092.08	$0.00	$0.00
Terry E. Mayer	$121.91	$727.82	$3,289.60	$1,455.64	$0.00
Dean Mendez	–	$1,039.37	$1,329.47	$2,078.74	$749.27
Darren Meyer	$196.77	$1,510.06	$1,350.92	$3,020.12	$1,865.97
David Michalewicz	$0.00	$0.00	$12,780.73	$0.00	$0.00
Joseph B. Molina	$0.00	$0.00	$15,933.82	$0.00	$0.00
James C. Monroe	$0.00	$1,094.13	$143.90	$2,188.26	$2,044.36
W.C. Monroe	$620.57	$129.98	$3,920.57	$259.96	$0.00
Charles W. Montroy	$0.00	$272.47	$1,356.40	$544.94	$0.00

Michael Paul Nichols, Sr.	$0.00	$401.60	$6,472.02	$803.20	$0.00
Jesse Niemeyer	$86.08	$236.52	$11,994.30	$473.04	$0.00
Larry B. Nolen	$348.07	$1,305.13	$0.00	$2,610.26	$2,958.33
Randy Nors	$0.00	$1,294.99	$1,176.01	$2,589.98	$1,413.97
Jeremey James Nunes	–	$0.00	$9,513.52	$0.00	$0.00
Gary Owen	$0.00	$1,314.73	$2,073.32	$2,629.46	$556.14
Frank L. Packwood	$0.00	$271.75	$3,716.49	$543.50	$0.00
Bobby Pankonien	$0.00	$247.09	$1,642.07	$494.18	$0.00
Jerry Dale Pankonien	$0.00	$497.17	$3,885.86	$994.34	$0.00
Ralph B. Patrick	$0.00	$595.30	$2,712.50	$1,190.60	$0.00
George W. Paulk, III	$0.00	$5.96	$14,561.76	$11.92	$0.00
Chirs Pechacek	$0.00	$0.00	$29,759.59	$0.00	$0.00
Donald Penoli	$0.00	$838.75	$1,401.33	$1,677.50	$276.17

Adam Perry	–	$168.89	$907.40	$337.78	$0.00
Douglas S. Phillips	$0.00	$1,369.04	$3,269.67	$2,738.08	$0.00
Melvin Darren Qualls	$0.00	$482.74	$5,230.51	$965.48	$0.00
Berry Raley	$0.00	$1,339.41	$1,409.47	$2,678.82	$1,269.35
Mikeal Ready	$0.00	$360.71	$6,739.09	$721.42	$0.00
Richard T. Reid	$386.63	$0.00	$4,468.90	$0.00	$0.00
Steven C. Reinke	$0.00	$340.78	$5,680.69	$681.56	$0.00
Jimmie D. Robinson	$12.94	$230.19	$4,702.30	$460.38	$0.00
Lester D. Robison	$39.34	$293.37	$6,830.44	$586.74	$0.00
Benjamin Samarripa	$171.47	$0.00	$11,001.61	$0.00	$0.00
David Sauer	–	$581.72	$348.32	$1,163.72	$815.40
Dennis Schroeder	$306.44	$1,627.01	$41.42	$3,254.02	$3,212.60
Frank Scott	$0.00	$0.00	$13,992.56	$0.00	$0.00
James A. Seay, Jr.	$0.00	$0.00	$11,531.76	$0.00	$0.00
James A. Seay, Sr.	$0.00	$1,617.79	$396.36	$3,235.58	$2,839.22

Paul E. Simmons	$0.00	$980.21	$1,201.48	$1,960.42	$758.94
Joseph Singer	$174.12	$485.27	$10,127.93	$970.54	$0.00
Demetris Smith	–	$313.91	$3,608.82	$627.82	$0.00
Jesse Smith	–	$216.06	$3,261.36	$432.12	$0.00
Christe-pher Sobin	–	$0.00	$4,234.06	$0.00	$0.00
Henry Wayne Sovey	$0.00	$0.00	$7,089.86	$0.00	$0.00
Michael Shane Spann	–	$521.60	$352.99	$1,043.20	$690,21
Kenneth Stoermer	$0.00	$1,368.92	$191.35	$2,737.84	$2,546.49
Bobby R. Teague	$0.00	$141.97	$7,842.39	$283.94	$0.00
Shannon A. Teal	$431.48	$265.26	$5,926.39	$530.52	$0.00
Darrell Town-send	$89.50	$0.00	$12,355.73	$0.00	$0.00
Brian Treat	–	$22.00	$1,090.19	$44.00	$0.00
Brooks Tucker	–	$149.89	$4,815.23	$299.78	$0.00
Steve C. Tull	$164.98	$0.00	$12,452.26	$0.00	$0.00
Richard Tupy	–	$1,436.96	$34.25	$2,873.92	$2,839.67
Kenneth Uptmor	$0.00	$1,574.77	$59.46	$3,149.54	$3,090.08

Alfonce L. Urban-ovsky	$0.00	$525.65	$4,444.41	$1,051.30	$0.00
Billy Vaden	$0.00	$1,204.14	$108.34	$2,408.28	$2,299.94
James R. Varino, II	$26.69	$0.00	$8,566.01	$0.00	$0.00
L. W. Vaughn	$77.74	$0.00	$18,950.88	$0.00	$0.00
Patrick Veselka	–	$255.09	$296.83	$510.18	$213.35
John S. Villanueva	$171.46	$0.00	$8,290.41	$0.00	$0.00
Kevin J. Vranich	$141.67	$0.00	$9,263.17	$0.00	$0.00
Raymond Wachs-mann	$0.00	$0.00	$25,041.36	$0.00	$0.00
David Walsl-been	$484.34	$708.52	$21,778.17	$1,417.04	$0.00
Ronald W. Watts	$0.00	$0.00	$6,193.06	$0.00	$0.00
Mike Wester-field	$501.04	$149.27	$4,397.83	$298.54	$0.00
James E. Wetter-man	$0.00	$0.00	$16,593.53	$0.00	$0.00
Otis Lee Williams	$0.00	$339.27	$6,539.67	$678.54	$0.00
Richard Glenn Wilson	$546.08	$595.22	$19,144.80	$1,190.44	$0.00

Sherril Don Wood	$537.01	$0.05	$1,262.89	$0.10	$0.00
Charles Yarber	$405.29	$0.00	$12,679.81	$0.00	$0.00
Don C. Yeager	$0.00	$0.00	$12,449.27	$0.00	$0.00
Royce Zatopek	$243.06	$258.10	$3,573.67	516.20	$0.00

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOSEPH SINGER and	§	
CHARLES LINDORFER,	§	
Individually and on	§	
Behalf of Others	§	
Similarly Situated,	§	**CIVIL ACTION NO.**
Plaintiffs,	§	**W-99-CA-296**
	§	
v.	§	
CITY OF WACO, TEXAS,	§	
Defendant.	§	

ORDER

(Filed Nov. 13, 2001)

Plaintiffs have moved collectively for an award of costs and attorney's fees under the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*[1] Plaintiffs seek $250,750.00 in attorney's fees expended on the prosecution of their claims against the City of Waco and John Fasana, the Chief of the Waco Fire Department. Title 29 U.S.C. § 216(b) provides that when an "employer" is found to be in violation of the FLSA:

> [T]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

[1] The Plaintiffs' motion does not delineate between the attorney's fee requests of the Fire Alarm Operator Plaintiffs and the Fire Suppression Plaintiffs.

A court has no discretion to determine whether to award fees and costs. Discretion applies only to the amount and the reasonableness of the fee. *Diaz v. Robert Ruiz, Inc.*, 808 F.2d 427, 429 (5th Cir. 1987); *Wright v. Carrigg*, 275 F.2d 448 (4th Cir. 1960); *Birbalas v. Cuneo Printing Industries, Inc.*, 140 F.2d 826 (7th Cir. 1944).[2]

After making a finding that the plaintiff was successful in proving a violation of the FLSA, the Court must then decide what fee is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433 & n.7 (1982). The determination of a fair and reasonable fee award involves a two-step approach. First, the Court ascertains the number of hours Plaintiffs' attorney reasonably spent on the case. *Hensley*, 461 U.S. at 433. This includes time spent on non-FLSA issues to the extent that those issues interrelate and overlap with FLSA ones. *Diaz v. Robert Ruiz, Inc.*, 808 F.2d 427, 429 (5th Cir. 1987).

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[2] There is a distinction between fee awards under section 216(b) of the FLSA and other fee-shifting statutes in the civil rights arena, most notably 42 U.S.C. § 1988. The Seventh Circuit Court of Appeals has warned against "the tendency to treat all attorneys' fees statutes as if they were insignificant variations of § 1988." *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 318 (7th Cir. 1994). The *Stomper* court explained that the civil rights statutes have "a unique background and history of interpretation, which cannot be generalized to other statutes authorizing the award of fees." 27 F.3d at 318. Under typical fee-shifting statutes, a party must be a prevailing party in order to recovery its attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 433 & n.7 (1982). Under the FLSA, however, the "prevailing party" language is notably absent. The plaintiff is entitled to a mandatory award of attorney's fees if a violation of the FLSA is established. 29 U.S.C. § 216(b).

Next, the Court multiplies that number by a reasonable hourly rate for each attorney. *Hensley*, 461 U.S. at 433. A reasonable billing rate is normally arrived at by reference to the "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). A fee applicant is required to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for "similar services by lawyers of reasonably comparable skill, experience, and reputation." *Stenson*, 465 U.S. at 895-96 n.11.

The figure reached through this method is called the "lodestar amount," and constitutes the "initial estimate of the value of a lawyer's services" in determining the final fee award. *Hensley*, 461 U.S. at 433. The lodestar amount may then be enhanced or reduced based on the circumstances of the particular litigation. *Pennsylvania v. Delaware Valley Citizens' Counsel*, 483 U.S. 711, 729-31 (1987); *Stenson*, 465 U.S. at 899. In determining whether to adjust that amount, the Court is to consider twelve factors. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974).[3] "The lodestar may be adjusted according to a *Johnson* factor only if that factor is not

[3] The twelve *Johnson* factors are: (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

already taken into account by the lodestar." *Transamerican Natural Gas Corp. v. Zapata Partnership, Ltd. (In re Fender)*, 12 F.3d 480, 487 (5th Cir. 1994).

DISCUSSION

The Court initially finds that the Plaintiffs are prevailing parties against the City in this action because they were successful in proving that the City violated the FLSA.[4] A "prevailing party" under 42 U.S.C. § 1988 jurisprudence is a party who "succeed[s] on any significant issue in litigation that achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 n.7. Even under the "prevailing party" standard of the civil rights fee-shifting statute, Plaintiffs are entitled to a fee award because they succeeded in establishing that the City was incorrectly calculating their overtime pay. Despite the fact that in this case the City's miscalculation inured somewhat to the Plaintiffs' benefit, the City was violating the FLSA with regard to its pay practices for the Plaintiffs.

Defendant Jon Fasana, dismissed from this case prior to trial, is correct, however, that the Plaintiffs were not successful in proving that he was an "employer" who violated the FLSA. Thus, according to Fasana, Plaintiffs

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[4] Of course, the FLSA does not use the "prevailing party" language in its attorney's fees provisions. The Supreme Court, however, has consistently emphasized that the lodestar calculation approach provides an appropriate, objective basis on which to make an initial estimate of the value of a lawyer's services. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986).

are not prevailing parties as to him, and are not entitled to attorney's fees for the time expended on prosecuting the claim against Fasana. Moreover, the City argues that because the Plaintiffs' attorney's fee request does not delineate between the time spent on the claim against the City and the time spent on the claim against Fasana, the Court should divide the Plaintiffs' fee request in half. The Court, however, finds that such delineation is unnecessary. The Plaintiffs' claim against Fasana was that he was individually liable, along with the City, for the violations of the FLSA alleged by the Plaintiffs. Plaintiffs' claims against the City and Fasana arise out of the same basic set of facts, and are highly interrelated. Thus, even though not successful against Fasana, Plaintiffs are nonetheless prevailing parties. *Cf. Cobb v. Miller*, 818 F.2d 1227, 1233 (5th Cir. 1987) (holding that in 42 U.S.C. § 1983 case, plaintiff was prevailing party even though plaintiff did not prevail against two of three defendants where claims against the different defendants were interrelated and did not arise from readily separable conduct).

The City contends that not all the Plaintiffs were prevailing parties because most of the Plaintiffs did not recover monetary damages from the City. This contention, however, ignores the plain language of the statute. The FLSA requires the Court to award attorney's fees "in addition to any judgment awarded." 29 U.S.C. § 216(b). Plaintiffs proved that they were being paid in violation of the FLSA, and that finding alone entitles Plaintiffs to attorney's fees.

The City also contends that the Plaintiffs' fee award should be reduced because of the relationship between the amount of damages received and the amount of damages sought. The approach suggested by the City has been

explicitly rejected in the civil rights fee award context. Where the other *Johnson* factors do not justify a reduction, a fee award should not be reduced simply because of a low damages award. In the Fifth Circuit Court of Appeals' view, reducing fees for this reason would amount to adopting the proportionality approach rejected in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). *Cobb v. Miller*, 818 F.2d 1227 (5th Cir. 1987). Simply put, there is no rule of proportionality between fee awards under 42 U.S.C. § 1988 and the amount of damages a civil rights plaintiff actually recovers. *Brantley v. Surles*, 804 F.2d 321, 326-27 (5th Cir. 1986). This reasoning is equally applicable to a fee award under the FLSA.

Turning to the hours spent by Plaintiffs' attorney on this case. The requesting party must submit contemporaneous time records for work performed, specifying the relevant dates, hours expended, and the nature of the work performed. Plaintiffs' attorney's submission indicates that he spent 1,253.75 hours on the prosecution of the Plaintiffs' claims against the City and Fasana. A review of the time records indicates that the Plaintiffs' attorney did not duplicate his efforts nor did the Plaintiffs' attorney fail to adequately describe each time entry. As such, the 1,253.75 hours of time spent on the Plaintiffs' case by the Plaintiffs' attorney were, in the Court's opinion, both reasonable and necessary to the prosecution of the case. With regard to the appropriate hourly rate for the time spent by the Plaintiffs' attorney, the Court finds that the prevailing rate of $200.00 per hour cited by Plaintiffs' attorney to be within the reasonable and customary range of fees charged in employment cases in the Western District of Texas in the Waco Division. These two figures,

therefore, establish the "lodestar" amount of $250,750.00. *Johnson*, 488 F.2d at 717-19.

In determining whether to adjust that amount, the Court is to consider twelve factors. Accordingly, these factors and the Court's finding regarding each are as follows:

1. *The time and labor required for the litigation* – This factor has already been taken into account in determining the "lodestar" amount, and should not be used to adjust the lodestar amount.

2. *The novelty and difficulty of the questions presented* – Litigation involving the section 207(k) exemption to the FLSA is relatively novel in the Western District of Texas and the Fifth Circuit Court of Appeals. The particular questions presented in this case involved detailed and lengthy analysis of cases from outside of this Circuit. The legal and factual arguments presented to the Court during the course of this case were detailed and extensive, and amounted to an exhaustive analysis of the entire federal court system's analysis of section 207(k) of the FLSA. The large number of Plaintiffs in this case also presented some case management difficulties for the Plaintiffs' attorney, particularly in the review of the payroll records for each Plaintiff for each pay period during a five year period of time. Because of these unique problems, this case was more difficult to litigate and manage than typical FLSA cases filed in the Western District of Texas.

3. *The skill required to perform the legal skills properly* – This case involved extensive legal research into the body of FLSA law in numerous

district courts and courts of appeals. The discovery in this case was extensive, complex, and voluminous. Defendant filed multiple dispositive motions, and Plaintiffs filed a dispositive motion of their own. Plaintiffs successfully pursued a *Daubert* challenge to the Defendant's proffered expert witness on governmental pay practices and the FLSA. This case was tried before a jury on complex liability issues, and before the Court on an even more elaborate and demanding damages issue. In all of these activities, the Plaintiffs' attorney performed at an extraordinary high skill level. Plaintiffs's attorney's performance in the courtroom was straightforward, and greatly assisted the Court in making difficult and intricate determinations. As noted above, the legal skill required to litigate a case involving hundreds of thousands of payroll records, one-hundred, eighty Plaintiffs and the scarcity of legal precedent in the Fifth Circuit for cases of this type considerably exceeds that necessary for a typical employment or FLSA case filed in the Western District of Texas involving a single or few plaintiffs and a single defendant.

4. *The preclusion of other employment by the attorney due to acceptance of the case* – There is nothing in the Plaintiffs' attorney's fee request that indicates he was precluded from other employment because of the acceptance of this case. In fact, the Court notes that Plaintiffs' counsel in this case is Plaintiffs' counsel in *Benjamin Jones, et al. v. The City of Marlin, Texas*, W-01-CA-140 which also involves the application of the section 207(k) exemption of the FLSA to a city's pay practices for its fire suppression employees.

5. *The customary fee* – This factor has already been taken into account in determining the "lodestar"

amount, and should not be used to adjust the lodestar amount.

6. *Whether fee is fixed or contingent* – There are few employment related cases taken on by plaintiffs attorneys in the Western District of Texas on a non-contingent fee basis. The Court is aware of few attorneys who take on employment cases for a fixed hourly rate agreement. These concerns of plaintiffs attorneys are heightened when the defendant is a governmental entity with nearly unlimited resources to expend on a vigorous defense. In this case, Plaintiffs' attorney was retained on a mixed fee arrangement. Plaintiffs' attorney was initially retained on an hourly basis during the pre-lawsuit investigation period, but altered the arrangement to a 25% contingency fee arrangement shortly after filing the lawsuit.

7. *Time limitations imposed by the client or the circumstances* – This factor does not appear to have an impact on whether the lodestar amount should be adjusted. Perhaps some consideration should be made of the length of this case. This case went to trial 19 months after being filed, and the Court entered its judgment approximately two years after the lawsuit was filed.

8. *The amount involved and the result obtained* – Plaintiffs sought over $5,000,000.00 in compensatory and liquidated damages from Defendant. Plaintiffs recovered approximately $180,000.00 in compensatory and liquidated damages from Defendant. Although not significant to the determination of whether Plaintiffs should recover attorney's fees in the first place, the relationship between the amount involved and the result obtained should be considered in whether the

Court adjusts the lodestar amount. The Court would also note that the Plaintiffs were successful in obtaining a change in the pay practices of the City; a result which clearly indicates a successful outcome for Plaintiffs despite the recovery of damages at a level lower than expected.

9. *The experience, reputation, and ability of the attorneys* – Both Plaintiffs' and Defendant's attorneys were highly skilled, and have demonstrated to the Court a high degree of ability to litigate employment issues in federal courts. Plaintiffs' counsel has developed a favorable reputation the central Texas legal community for vigorous prosecution of plaintiff's employment claims. In fact, Plaintiff's counsel's practice is nearly entirely dependant upon representing governmental employees in employment litigation. Plaintiffs' counsel is one of the few attorneys in the area whose practice is devoted to litigation on behalf of governmental employees. As noted above, the ability of Plaintiffs' counsel far exceeds that of the typical practitioner in the area.

10. *The "undesirability" of the case* – It is the Court's experience that few Plaintiffs' attorneys desire to pursue litigation against local government entities because of the stigma associated with such cases. This case, however, is not a typical civil rights case involving oftentimes controversial allegations of insidious discrimination on the part of the local government. This case represents a dispute between an employer and its employees, albeit a highly complicated one.

11. *The nature and length of the professional relationship with the client* – Plaintiffs' counsel has represented clients who were governmental employees for nearly his entire legal career. As

noted above, Plaintiffs' counsel has developed a reputation for such representations.

12. *Awards in similar cases* – The Court is aware of no other similar FLSA cases prosecuted in this area, so this factor should not be used to determine whether to adjust the lodestar amount.

Johnson, 488 F.2d at 717-19. Factors, 2, 3, 9 weigh in favor of a moderate upward adjustment. Factor 8 weights in favor of a downward adjustment. The other factors do not have an effect on the lodestar adjustment decision. Thus, the Court determines that the lodestar amount should not be adjusted. Additionally, due to the strong likelihood of an appeal in this case, the Court will also briefly address attorney's fees on appeal. Should Defendant seek some form of post-judgment relief, the following schedule of fees should apply:

1. If a notice of appeal is filed by Defendant with the United States Court of Appeals, but a reversal of the case does not result, Plaintiffs should be awarded an additional $2,500.00 in attorney's fees.

2. If a petition for writ of certiorari is filed by Defendant but not granted by the United States Supreme Court, Plaintiffs should be awarded an additional $2,500.00 in attorney's fees.

3. If petition for writ of certiorari is granted by the United States Supreme Court, but a reversal of the case does not result, Plaintiffs should be awarded an additional $2,500.00 in attorney's fees.

CONCLUSION

As a result of the foregoing calculations, the Court finds that Plaintiffs' request has merit and should be granted. In reaching its decision, the Court has considered the following:

1. the amount requested by Plaintiffs; and
2. the *Johnson* factors.

Accordingly, it is

ORDERED that Plaintiffs' motion for award of attorneys' fees is **GRANTED**. Plaintiffs shall recover $250,750.00 in satisfaction of their fee request. It is further

ORDERED that if a notice of appeal is filed by Defendant with the United States Court of Appeals, but a reversal of the case does not result, Plaintiffs shall be awarded an additional $2,500.00 in attorney's fees. If a petition for writ of certiorari is filed by Defendant but not granted by the United States Supreme Court, Plaintiffs shall be awarded an additional $2,500.00 in attorneys' fees. If petition for writ of certiorari is granted by the United States Supreme Court, but a reversal of the case does not result, Plaintiffs shall be awarded an additional $2,500.00 in attorney's fees.

SIGNED this 13th day of November 2001.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-51185

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL

Plaintiffs – Counter Defendants – Appellants – Cross-Appellees

v.

CITY OF WACO, TEXAS; ET AL

Defendants

CITY OF WACO, TEXAS

Defendant – Counter Claimant – Appellee – Cross-Appellant

Case No. 01-51258

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL

Plaintiffs – Counter Defendants – Appellees

v.

CITY OF WACO, TEXAS; ET AL

Defendants

CITY OF WACO, TEXAS

Defendant – Counter Claimant – Appellant

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Appeals from the United States District Court for the Western District of Texas, Waco

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ON PETITION FOR REHEARING EN BANC

(Filed Apr. 22, 2003)

(Opinion 3/27/03, 5 Cir., ___, ___ F.3d ___)

Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS*, District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not

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* District Judge of the Eastern District of Texas, sitting by designation.

having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge